EDITOR'S NOTE

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(9)

No. 84-1580-CFY
Status: GRANTED

Title: United States, Petitioner
v.
Joseph Iradi

Docketed:
April 4, 1985

Court: United States Court of Appeals
for the Third Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Maguigan, Holly

Entry	Date	Note	Proceedings and Orders
1	Apr 4 1985	G	Petition for writ of certiorari filed.
2	May 7 1985		DISTRIBUTED. May 23, 1985
3	May 8 1985	X	Brief of respondent Joseph Iradi in opposition filed.
4	May 17 1985	X	Reply brief of petitioner United States filed.
5	May 28 1985		Petition GRANTED.
			**********
7	Jul 11 1985		Order extending time to file brief of petitioner on the merits until August 2, 1985.
8	Jul 11 1985		The time for filing the joint appendix has been extended to August 2, 1985
10	Jul 11 1985		Order extending time to file brief of respondent on the merits until September 16, 1985.
11	Aug 2 1985		Joint appendix filed.
13	Aug 7 1985		Order extending time to file brief of petitioner on the merits until August 9, 1985.
14	Aug 12 1985		Brief of petitioner United States filed.
15	Sep 6 1985		Record filed.
16	Sep 16 1985		Record filed.
17	Sep 16 1985		Certified copy of original record, except documents 47 and 65.
19	Sep 16 1985		Order extending time to file brief of respondent on the merits until September 30, 1985.
20	Oct 2 1985		Brief of respondent Joseph Iradi filed.
21	Oct 17 1985		CIRCULATED.
22	Oct 22 1985		SET FOR ARGUMENT, Tuesday, December 3, 1985. (4th case).
23	Nov 26 1985	X	Reply brief of petitioner United States filed.
24	Dec 3 1985		ARGUED.

84-1580

No.

In the Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA, PETITIONER

v.

JOSEPH INADI

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Confrontation Clause bars the prosecution from introducing statements falling within the co-conspirator exception to the hearsay rule (Fed. R. Evid. 801(d)(2)(E)) unless the prosecution establishes that the declarant is unavailable to testify at trial.

2. Whether, if the court of appeals was correct that proof of unavailability is required, it should have ordered a remand hearing to determine the question of unavailability rather than ordering a new trial.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution, statutes and rules:

Constitution, statutes and rules—Continued: Page

Miscellaneous:

In the Supreme Court of the United States

OCTOBER TERM, 1984

No.

UNITED STATES OF AMERICA, PETITIONER

v.

JOSEPH INADI

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-16a) is reported at 748 F.2d 812. The order amending that opinion (App., *infra*, 17a-19a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on November 13, 1984. The order denying rehearing was entered on February 8, 1985 (App., *infra*, 20a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION AND RULE INVOLVED

The Sixth Amendment provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him * * *.

Rule 801(d) of the Federal Rules of Evidence provides in pertinent part:

> A statement is not hearsay if—
>
> * * * * *
>
> (2) * * * The statement is offered against a party and is * * *, or (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Pennsylvania, respondent was convicted on one count of conspiring to manufacture and distribute methamphetamine, in violation of 21 U.S.C. 846; two counts of using a telephone to facilitate a drug felony, in violation of 21 U.S.C. 843(b); one count of causing interstate travel to facilitate a drug felony, in violation of 18 U.S.C. 1952(a)(3); and one count of distributing methamphetamine, in violation of 21 U.S.C. 841(a)(1). He was sentenced to three years' imprisonment to be followed by a seven-year special parole term. The court of appeals reversed (App., *infra*, 1a-16a).

1. The evidence at trial is summarized in the opinion of the court of appeals (App., *infra*, 2a-5a). It showed that in September 1979 unindicted co-conspirator Michael McKeon approached respondent seeking a distribution "outlet" for methamphetamine. The two men agreed that respondent would supply

cash and chemicals for the manufacture of methamphetamine and would also be responsible for distribution, while McKeon and co-conspirator William Levan would actually manufacture the drug (*id.* at 2a).

McKeon and Levan made three attempts to manufacture methamphetamine in Philadelphia between December 1979 and April 1980. The first "cook" was successful, producing three pounds of methamphetamine, which McKeon delivered to respondent. McKeon, Levan, and respondent shared a profit of $19,500 on that transaction. The second "cook" failed to produce methamphetamine because a necessary ingredient supplied by respondent turned out to be some other substance. A third "cook" succeeded in producing three and one-half pounds of methamphetamine, which Levan delivered to respondent (App., *infra*, 3a).

Sometime around May 1980, McKeon went to Cape May, New Jersey, with the liquid residue from the third "cook." He met respondent, Levan, and co-conspirator John Lazaro, as well as two others not named as co-conspirators, at an empty house McKeon believed to be rented through Lazaro. There they attempted to extract additional methamphetamine from the liquid residue. This "drying" resulted in less than an ounce of low quality product, which McKeon promptly sold for $200 (App., *infra*, 3a).

In the early morning hours of May 23, 1980, two local police officers surreptitiously entered the Cape May house pursuant to a search warrant and removed a tray covered with drying methamphetamine. With permission of the issuing magistrate, the officers delayed returning an inventory, leaving the participants to speculate about what had happened to the missing tray (App., *infra*, 3a).

On May 25, 1980, two DEA agents observed a meeting between respondent and Lazaro alongside Lazaro's car in the parking lot of a restaurant in Philadelphia. At one point, one of the agents observed respondent lean into the car. After Lazaro drove off, the agents overtook and stopped his car. They searched the car, as well as Lazaro and his wife Marianne, who was a passenger at the time. During the search, Marianne Lazaro threw away a clear plastic bag containing a white powder that her husband had handed to her after the meeting with respondent. Finding nothing, the agents allowed the Lazaros to leave. Eight hours later, one of the agents returned to the scene of the stop and found a clear plastic bag containing a small quantity of methamphetamine (App., *infra*, 3a-4a).[1]

From May 23 to May 27, 1980, the Cape May County Prosecutor's Office lawfully intercepted five telephone conversations between various participants in the conspiracy; the taped conversations were played for the jury at trial. In one conversation, Lazaro asked respondent, in code, for a quantity of methamphetamine and reported on the residue missing from the Cape May house, suggesting that "Mike" probably took it. In another conversation, Lazaro and respondent arranged the meeting in the parking lot. In a third conversation, Lazaro reported to respondent that he kicked "that piece" under his car during the May 25 stop by the DEA agents, and he wondered how the agents were tipped off (App., *infra*, 4a-5a).

[1] Marianne Lazaro, who was named as an unindicted co-conspirator and who testified for the government under a grant of use immunity, denied that the bag found by the agent was the same one that her husband had given her (App., *infra*, 4a).

Additionally, in a conversation between McKeon and Marianne Lazaro, the latter described the May 25 incident and suggested that respondent might have set them up. McKeon assured her that respondent was not an informant. In the final intercepted conversation, Levan and John Lazaro discussed the missing residue and speculated about who had set Lazaro up for the May 25 stop (App., *infra*, 5a).

2. At trial, respondent sought to exclude the recorded statements of John Lazaro and the other co-conspirators on the ground that the statements did not satisfy the requirements of the co-conspirator exception to the hearsay rule. Fed. R. Evid. 801(d)(2)(E) (3 Tr. 285). He also challenged Lazaro's statements on Confrontation Clause grounds, arguing that that provision requires the government to establish that the nontestifying co-conspirator is unavailable to testify (*id.* at 285-286). The district court ruled that all the co-conspirator statements satisfied the requirements of Rule 801(d)(2)(E) (5 Tr. 574).[2] Without expressly deciding whether the Confrontation Clause required the government to establish Lazaro's unavailability, the district court admitted Lazaro's statements in reliance on the government's representation that Lazaro would refuse to testify whether or not he had a valid Fifth Amendment privilege and

[2] Three of the five conversations of Lazaro that were admitted were conversations with respondent (App., *infra*, 4a-5a) and thus may have constituted adoptive admission. Fed. R. Evid. 801(d)(2)(B); see also, *e.g.*, 4 D. Louisell & C. Mueller, *Federal Evidence* § 424 (1980); *McCormick's Handbook on the Law of Evidence* § 270 (E. Cleary 2d ed. 1972) [hereinafter cited as *McCormick on Evidence*]. However, this ground for admission was not urged or ruled on below.

was therefore unavailable (3 Tr. 292-293; 5 Tr. 574-575).[3]

3. On appeal, respondent reiterated his contention that the admission of John Lazaro's recorded statements violated both the co-conspirator exception to the hearsay rule and the Confrontation Clause. The court of appeals held that Lazaro's statements fell within the coverage of the co-conspirator rule (App., *infra*, 8a-11a). However, the court went on to accept respondent's contention that the Confrontation Clause requires the government to show that a nontestifying co-conspirator is unavailable to testify as a foundation for admitting his out-of-court statements, and that the government had failed to make an adequate showing of Lazaro's unavailability in this case (*id.* at 11a-13a).

In imposing an "unavailability" requirement under the Confrontation Clause, the court of appeals relied almost exclusively (App., *infra*, 12a) on this Court's dictum in *Ohio* v. *Roberts*, 448 U.S. 56, 65 (1980), that "in conformance with the Framers' preference for face-to-face accusation, the Sixth Amendment establishes a rule of necessity. In the usual case * * * the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant." The court of appeals found no reason for excepting co-conspirator statements from "the clear constitutional rule laid

[3] Of the other co-conspirators whose out-of-court statements were used, McKeon and Marianne Lazaro both testified at trial under grants of immunity, and Levan properly asserted his Fifth Amendment privilege outside the presence of the jury (App., *infra*, 15a n.6). The government also subpoenaed John Lazaro to appear in order to establish his unavailability, but Lazaro failed to do so at the appointed time, allegedly because of "car problems" (4 Tr. 408).

down in *Roberts*" (App., *infra*, 12a). The court added (*id.* at 13a) that "it does not seem unreasonable to require the government to demonstrate that its hardship is real before availing itself of this tremendous evidentiary advantage."

The court rejected the government's argument that Lazaro's unavailability had in fact been established (App., *infra*, 13a-16a). The government had represented to the district court that Lazaro was adamantly refusing to testify and was prepared to go to jail for contempt (*id.* at 15a). The government had also subpoenaed Lazaro, but he had failed to appear, claiming "car troubles" (*ibid.*). The court of appeals suggested that the government should have requested a bench warrant to secure Lazaro's presence (*ibid.*) and insisted that nothing less than "an actual assertion of privilege and exemption by ruling of the court" would suffice to prove unavailability (*id.* at 16a). The court therefore reversed and remanded for a new trial (*ibid.*).

4. The government petitioned for rehearing with suggestion for rehearing en banc. First, the government challenged the panel's holding that under the Confrontation Clause the prosecution must show that a nontestifying co-conspirator is unavailable to testify in order to be able to introduce his out-of-court statements at trial. In addition, the government argued that, even if the court were correct in so holding, it erred in remanding for a new trial instead of for a limited hearing to determine whether Lazaro was in fact unavailable to testify and whether his testimony would have been helpful to the defense—since only then would any purpose be served by holding a new trial. The court of appeals denied the petition with four judges dissenting (App., *infra*, 20a).

REASONS FOR GRANTING THE PETITION

1. This case presents a question of great practical and doctrinal importance that has sharply split the courts of appeals. The introduction of co-conspirator declarations is an event that occurs thousands of times each year in criminal prosecutions across the land, and that heretofore has generally been thought not to be conditioned upon any showing of unavailability. And as cases like *Ohio* v. *Roberts*, 448 U.S. 56 (1980), show, a determination of unavailability can often be burdensome and controversial. Whether the Confrontation Clause imposes this substantial burden on the criminal trial process is a question that plainly warrants resolution by this Court.

a. Statements made by co-conspirators in furtherance of a conspiracy have long been exempt from the hearsay rule. See, *e.g.*, 4 J. Wigmore, *Evidence in Trials at Common Law* § 1079 (J. Chadbourn ed. 1972) [hereinafter cited as *Wigmore on Evidence*]; *McCormick on Evidence* § 267, at 645-646. This exemption is codified in traditional form in Fed. R. Evid. 801(d)(2)(E). Proof of the declarant's unavailability to testify at trial has never been a prerequisite for admission of such statements. Fed. R. Evid. 801(d)(2)(E); 4 *Wigmore on Evidence* § 1079; *McCormick on Evidence* § 267.

The co-conspirator rule is one of the most important and most frequently invoked exceptions to the hearsay rule. Following this Court's decision in *Ohio* v. *Roberts*, however, much confusion has developed among the lower courts regarding the constitutionality of the traditional co-conspirator rule. See *Sanson* v. *United States*, No. 83-6454 (June 25, 1984) (White, J., dissenting from denial of certiorari); *Means* v. *United States*, No. 83-6866 (Nov. 26, 1984), slip op. 1 n.1 (Brennan and White, JJ., dissenting from denial of certiorari). In the present case, the Third Circuit, purporting to follow *Roberts*, held that the admission of co-conspirator statements falling within Fed. R. Evid. 801(d)(2)(E) is barred by the Confrontation Clause unless the government produces the declarant or shows that he is unavailable to testify. Similarly, the Ninth Circuit recently held that the government had violated the Confrontation Clause by introducing entries made in drug ledgers by unidentifiable co-conspirators. *United States* v. *Ordonez*, 737 F.2d 793, 802 (1984). The court faulted the government for failing to prove "that these unidentified persons were not available to testify at trial or that a good faith effort had been made to obtain their testimony" (*ibid.*). But see *United States* v. *Snow*, 521 F.2d 730, 736 (9th Cir. 1975), cert. denied, 423 U.S. 1090 (1976) (expressly rejecting "unavailability" requirement).

In addition, two other courts of appeals, in post-*Roberts* opinions, have suggested in dictum that proof of the declarant's unavailability may be a constitutional prerequisite for admission of co-conspirator statements. However, these courts went on to find that such a showing had been made in the cases before them. *United States* v. *Lisotto*, 722 F.2d 85, 88 (4th Cir. 1983), cert. denied, No. 83-1417 (Mar. 26, 1984); *United States* v. *Peacock*, 654 F.2d 339, 349-350 (5th Cir. 1981), cert. denied, 464 U.S. 965 (1983).[4]

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[4] In earlier decisions, however, these same courts had taken the contrary view and held that the Confrontation Clause is coextensive with the co-conspirator exemption. See *United States* v. *Lurz*, 666 F.2d 69, 80-81 (4th Cir. 1981), cert. denied, 455 U.S. 1005 & 457 U.S. 1136 (1982); *United States*

In stark contrast to these decisions, other courts of appeals have concluded that statements falling within the co-conspirator rule automatically satisfy Confrontation Clause standards. *E.g.*, *United States* v. *Kendall*, 665 F.2d 126, 133 (7th Cir. 1981), cert. denied, 455 U.S. 1021 (1982); *United States* v *Papia*, 560 F.2d 827, 836 n.3 (7th Cir. 1977); *United States* v. *McManus*, 560 F.2d 747, 750 (6th Cir. 1977), cert. denied, 434 U.S. 1047 (1978); *United States* v. *Swainson*, 548 F.2d 657, 661 (6th Cir.), cert. denied, 431 U.S. 937 (1977); *Ottomano* v. *United States*, 468 F.2d 269, 273 (1st Cir. 1972), cert. denied, 409 U.S. 1128 (1973); see also *United States* v. *Dunn*, No. 84-1236 (1st Cir. Mar. 29, 1985), slip op. 19; *United States* v. *Ordonez*, 737 F.2d at 812-814 (Norris, J., dissenting).[5]

Similar division and confusion is evident among the state courts. Compare *State of Arizona* v. *Martin*, 139 Ariz. 466, 479-480, 679 P.2d 489, 502-503 (1984) (court unsure whether unavailability necessary under

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v. *Burroughs*, 650 F.2d 595, 597 n.3 (5th Cir.), cert. denied, 454 U.S. 1037 (1981). See also *United States* v. *Johnson*, 575 F.2d 1347, 1362 (5th Cir. 1978), cert. denied, 440 U.S. 907 (1979).

[5] Other circuits have taken the position that statements admissible under the co-conspirator rule must be scrutinized on a case-by-case basis to determine whether they are sufficiently reliable to satisfy the Confrontation Clause. See, *e.g.*, *United States* v. *Wright*, 588 F.2d 31, 38 (2d Cir. 1978), cert. denied, 440 U.S. 917 (1979); *United States* v. *Roberts*, 583 F.2d 1173, 1175-1176 (10th Cir. 1978), cert. denied, 439 U.S. 1080 (1979); *United States* v. *Kelly*, 526 F.2d 615, 620-621 (8th Cir. 1975), cert. denied, 424 U.S. 971 (1976); *United States* v. *Snow*, 521 F.2d 730, 734-736 (9th Cir. 1975), cert. denied, 423 U.S. 1090 (1976). However, none of these cases holds that proof of the declarant's unavailability is a prerequisite for admission of co-conspirator statements.

Roberts; holds that co-conspirator/declarant must be produced or shown to be unavailable where there is doubt as to accuracy or reliability of statement), and *State* v. *Smith*, 353 N.W.2d 338, 341 (South Dakota 1984) (co-conspirator exception and Confrontation Clause "co-extensive" except in "unusual circumstances"), with *State* v. *Bauer*, 109 Wis.2d 204, 212-213, 325 N.W.2d 857, 862 (1982) (unavailability must be shown except in "special circumstances"). In light of the conflicting decisions of the federal courts of appeals and state courts and the apparent general confusion concerning this important issue, review by this Court clearly is warranted.

b. In our view, there is no basis for the position that the Confrontation Clause imposes a requirement of unavailability or any other requirements that go beyond those embodied in the traditional co-conspirator rule. The courts reaching a contrary conclusion have relied almost exclusively upon the *Roberts* dictum. App., *infra*, 11a-13a; *Ordonez*, 737 F.2d at 802; *Lisotto*, 722 F.2d at 88; *Peacock*, 654 F.2d at 349-350; see also *United States* v. *Gibbs*, 739 F.2d 838, 852-854 (3d Cir. 1984) (en banc) (Rosenn, J., dissenting). But they have plainly misinterpreted *Roberts* by placing too much reliance on language taken wholly out of context.

Roberts considered and rejected a Confrontation Clause challenge to the admission of testimony given at a preliminary hearing. No issue regarding the admission of co-conspirator statements was involved. In dictum, however, the Court observed (448 U.S. at 65):

> In the usual case (including cases where prior cross-examination has occurred), the prosecution must either produce, or demonstrate the unavail-

ability of, the declarant whose statement it wishes to use against the defendant. See *Mancusi* v. *Stubbs*, 408 U.S. 204 (1972); *Barber* v. *Page*, 390 U.S. 719 (1968). See also *Motes* v. *United States*, 178 U.S. 458 (1900); *California* v. *Green*, 399 U.S. at 161-162, 167, n.16.[7]

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[7] A demonstration of unavailability, however, is not always required. * * *

We believe that this statement, in context, meant only that the Confrontation Clause, like the hearsay rule, limits the admission of hearsay and that proof of the declarant's unavailability is sometimes a prerequisite for the admission of hearsay falling within one of the rule's exceptions. To the extent that the Court suggested that unavailability must be proved "[i]n the usual case" (448 U.S. at 65), the Court surely was referring to the admission of former testimony, a hearsay exception that has traditionally demanded such a showing. See Fed. R. Evid. 804(b)(1). This, of course, was the exception at issue in *Roberts*, as well as in each of the four cases cited by the Court: *Mancusi* v. *Stubbs*, 408 U.S. 204 (1972); *Barber* v. *Page*, 390 U.S. 719 (1968); *Motes* v. *United States*, 178 U.S. 458 (1900); and *California* v. *Green*, 399 U.S. 149 (1970).

The court below in this case, and other like-minded courts of appeals, have read the *Roberts* dictum with unquestioning literalness to mean that co-conspirator statements—and presumably other traditionally admissible out-of-court statements—are generally barred by the Confrontation Clause unless the declarant's unavailability is shown. This is a revolutionary proposition that the *Roberts* Court could not have intended to adopt in such an offhand manner. Under the Federal Rules of Evidence promulgated by this Court,

there are 23 specific types of hearsay that are admissible "even though the declarant is available as a witness" (Fed. R. Evid. 803). By contrast, there are only four hearsay exceptions—including former testimony—that require unavailability (Rule 804). Thus, if the court of appeals' reading of *Roberts* were correct, most of the traditional hearsay rule, which this Court endorsed in issuing the Federal Rules of Evidence, would contravene the Confrontation Clause. This seems most doubtful.

Elsewhere in *Roberts* the Court observed (448 U.S. at 66) that the reliability of hearsay statements "can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception." We believe that a similar approach is appropriate with respect to the requirement of unavailability. The traditional exceptions to the hearsay rule embody the thinking and experience of generations of judges, legislators, scholars, and practitioners, developed on the basis of considerations quite similar, if not identical, to those that would inform any Confrontation Clause inquiry. As the advisory committee note to Rule 804(b) explains: "Rule 803 *supra*, is based upon the assumption that a hearsay statement falling within one of its exceptions possesses qualities which justify the conclusion that whether the declarant is available or unavailable is not a relevant factor in determining admissibility." It is dubious that anything would be gained by reexamining this judgment under the uncertain light of the Confrontation Clause. The language of the Clause itself does not illuminate any of the difficult practical problems; indeed, "[i]t is common ground that the historical understanding of the clause furnishes no solid guide to adjudication." *Dutton* v.

Evans, 400 U.S. 74, 95 (1970) (Harlan, J., concurring).

This Court has twice considered the relationship between the Confrontation Clause and the co-conspirator rule—in *Delaney* v. *United States*, 263 U.S. 586 (1924), and in *Dutton*—and those decisions support the view that statements falling within the traditional co-conspirator rule present no Confrontation Clause problems. In *Delaney*, 263 U.S. at 590, a Confrontation Clause challenge to the admission of co-conspirator statements was summarily turned aside. In *Dutton*, the Court upheld a state co-conspirator exception that went far beyond the traditional federal rule. Writing for the plurality, Justice Stewart noted and appeared to disapprove (400 U.S. at 80) the lower court's interpretation of the Confrontation Clause, because it would "require[] a reappraisal of every exception to the hearsay rule, no matter how long established, in order to determine whether * * * it is supported by 'salient and cogent reasons.'" The plurality continued (*ibid.*): "[W]e do not question the validity of the coconspirator exception applied in the federal courts." Justice Harlan, the fifth member of the majority, would have gone further and held that the Confrontation Clause does not regulate the admission of hearsay, whether falling within a firmly rooted exception or not.

c. Besides its mechanical reliance on the *Roberts* dictum, the court of appeals in this case provided scant explanation for its conclusion that unavailability must be proven. The court merely observed (App., *infra*, 13a): "[I]t does not seem unreasonable to require the government to demonstrate that its hardship is real before availing itself of this tremendous evidentiary advantage." The court's ap-

parent reasoning—that the government does not need to introduce co-conspirator statements unless the declarant is unavailable—makes no sense and is in fact inconsistent with the court of appeals' disposition of this case itself.

Co-conspirator statements, unlike certain types of hearsay such as former testimony (Fed. R. Evid. 804(b)(1)), are not admitted on the theory that they are the best available substitute for unavailable live testimony. Instead, they are admitted because they have a discrete and independent probative value. The same is true for most of the other traditional hearsay exceptions for which unavailability need not be shown (see Fed. R. Evid. 803). A co-conspirator's live testimony is not a substitute for statements that he made during and in furtherance of the conspiracy any more than live testimony is a substitute for an excited utterance (Fed. R. Evid. 803(2)) or for a recorded recollection of "a matter about which [the] witness * * * now has insufficient recollection to enable him to testify fully and accurately" (Fed. R. Evid. 803(5)). The court of appeals implicitly recognized this point when it found no fault with the admission of out-of-court statements by those conspirators who testified at trial (see App., *infra*, 15a & n.6). But the court does not seem to have understood the implications of this result for its Confrontation Clause analysis.

The other explanation sometimes given for requiring a demonstration of the co-conspirator/declarant's unavailability is that the prosecutor should be forced "to put forward the best case he has against the defendant." Davenport, *The Confrontation Clause and the Co-Conspirator Exception in Criminal Prosecutions: A Functional Analysis*, 85 Harv. L. Rev. 1378,

1403 (1972). This explanation, which suggests that prosecutors introduce co-conspirator statements because they do not wish to exert the effort needed to locate and produce the co-conspirator as a witness, is surprisingly blind to the realities of criminal prosecutions. A co-conspirator is almost always chargeable with a criminal offense. If he was a major participant in the illegal scheme, he will certainly be wanted for prosecution. And even if he was only a minor figure, the prosecution will usually be interested in exploring the possibility of obtaining his testimony, which may be far more devastating to the other conspirators than his out-of-court statement standing alone. For these reasons, we believe it would be quite rare for prosecutors to be indifferent to the whereabouts of conspirators or their availability as witnesses. When co-conspirator statements are offered and the declarant is not called as a witness it is usually because (a) the co-conspirator is thought still to be in league with the defendant on trial; (b) he is certain to take the Fifth Amendment or otherwise refuse to testify; or (c) he is truly beyond the law's reach.

In any event, if a showing of unavailability is ever to be required, it can be justified only where the prosecution and the defense have unequal access to the declarant—as, for example, where the declarant is in a witness protection program.[6] In the present case, the declarant Lazaro's whereabouts were equally known to the prosecution and the defense. Lazaro

[6] Even in those circumstances, the problem presented is more aptly classified as relating to a defendant's right to compulsory process, not confrontation, and should arise only where the defendant affirmatively seeks to secure the declarant's presence as a witness, something respondent never displayed the slightest interest in doing.

was subpoenaed by the government but failed to appear due to "car problems" (see page 6 n.3, *supra*), and neither side pursued the matter further. If the defense had really wanted to obtain Lazaro's testimony and thought that he would waive any Fifth Amendment protection, it could and surely would have taken further steps. In reality, it seems quite clear that respondent's sole real interest was simply to nurture an issue to be raised on appeal.

2. Even assuming the court of appeals was correct in holding that the government must establish the co-conspirator/declarant's unavailability in order to be able to introduce his out-of-court statements, this case presents a second issue of substantial importance to the administration of criminal justice: whether the court of appeals erred in remanding for a new trial when the error it identified may have had no actual impact on the course of the first trial.[7]

[7] This is a recurring problem. For example, in *United States* v. *Van Dyke*, 643 F.2d 992 (4th Cir. 1981), the court of appeals reversed a conviction and remanded for a new trial based on a Fourth Amendment violation. At the time of trial, the defendant had "automatic standing," but by the time of the appellate decision, the automatic standing doctrine had been overruled in *United States* v. *Salvucci*, 448 U.S. 83 (1980). The court of appeals recognized (643 F.2d at 995) that on remand the government should be allowed to show that the defendant's own Fourth Amendment rights had not been violated, in which case the same evidence could again be admitted at retrial. But the court rejected the suggestion in our rehearing petition that it should order a remand hearing rather than a retrial, even though retrial would be pointless if the evidence remained admissible.

Likewise, in *United States* v. *Johnson*, 594 F.2d 1253 (9th Cir.), cert. denied, 444 U.S. 964 (1979), the court of appeals reversed convictions obtained following an exceptionally lengthy and complex trial and remanded for a new trial on

It is our submission that, rather than reflexively ordering a new trial, the court of appeals should have remanded for a limited hearing to determine whether Lazaro was in fact unavailable to testify, as the government contended. If Lazaro was unavailable, any error in failing to establish that fact as a foundation for admission of his statements was plainly harmless. Moreover, it would be utterly pointless to conduct a new trial that would be the same as the trial respondent already had received. Such a new trial would not only waste a week of the court's time, but also would result in a serious imposition on all of the parties and would diminish the resources available to give prompt and fair trials to other defendants. See *United States* v. *Gibbs*, 739 F.2d 838, 857-858 (3d Cir. 1984) (en banc) (Seitz, J., dissenting). Moreover, even if a limited remand hearing established that Lazaro would have testified, retrial would be unnecessary if the district court determined beyond a reasonable doubt that Lazaro's cross-examination would not have been helpful to the defense and that the violation of respondent's right to confronta-

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the ground that the government had failed to make the foundational showing required by Fed. R. Evid. 1006 for introduction of certain summary charts. The court denied our rehearing petition, which argued that the appropriate disposition in the first instance was to remand for a hearing at which the opportunity would be afforded the government to establish that a proper foundation existed for admission of the summaries.

Such reflexive ordering of a new trial, without considering the sufficiency of a more limited remand, may result in substantial injustice if reprosecution is precluded or hampered by the passage of time. At the very least, scarce judicial and prosecutorial resources are squandered by wholly unnecessary retrials at which the same evidence heard at the first trial is admissible at the second.

tion was therefore harmless. *E.g.*, *United States* v. *Hasting*, 461 U.S. 499 (1983).

A limited remand hearing for the purposes we have stated would not give the government a "second bite at the apple." At trial, there was no apparent need for the government to call Lazaro to the stand in order to establish his unwillingness to testify because the district court did not require the government to do so; insofar as the district court required a showing of unavailability at all, it was content to rely on the government's representation that Lazaro would refuse to testify whether or not he had a valid Fifth Amendment privilege. A limited remand hearing would give the government an opportunity to do what it has all along maintained it could do: establish Lazaro's unavailability.

This Court has expressly recognized the advantage of remanding for a limited hearing that would give the trial court an opportunity to correct its error and could thereby obviate the need for retrial of the entire case. Thus, in *Goldberg* v. *United States*, 425 U.S. 94 (1976), the Court remanded the case to the district court for a determination whether, under the correct standard, the particular writings in question there qualified as Jencks Act material that the government should have produced. *Id.* at 111. In so doing, the Court stated (*id.* at 111-112; footnote omitted):

> [W]e do not think that this Court should vacate [petitioner's] conviction and order a new trial, since petitioner's rights can be fully protected by a remand to the trial court with direction to hold an inquiry consistent with this opinion. The District Court will supplement the record with findings and enter a new final judgment of convic-

> tion if the court concludes after the inquiry to reaffirm its denial of petitioner's [Jencks Act] motion. This procedure will preserve petitioner's opportunity to seek further appellate review on the augmented record. On the other hand, if the court concludes that the Government should have been required to deliver the material, or part of it, to petitioner, and that the error was not harmless, the District Court will vacate the judgment of conviction and accord petitioner a new trial.

See also, *e.g.*, *Waller* v. *Georgia*, No. 83-321 (May 21, 1984), slip op. 9-11; *United States* v. *Wade*, 388 U.S. 218, 242 (1967); *Jackson* v. *Denno*, 378 U.S. 368, 394 (1964); *Brady* v. *Maryland*, 373 U.S. 83, 88-91 (1963); *Campbell* v. *United States*, 365 U.S. 85, 98-99 (1961). The court of appeals here should have followed the same procedure.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APRIL 1985

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-1882

UNITED STATES OF AMERICA

v.

INADI, JOSEPH, Joseph Inadi, APPELLANT

On Appeal from the United States
District Court for the
Eastern District of Pennsylvania

(D.C. Crim. No. 83-00108-01)

Argued: July 20, 1984

[Filed November 13, 1984]

OPINION OF THE COURT

Before: ADAMS, HIGGINBOTHAM and
VAN DUSEN, *Circuit Judges*

A. LEON HIGGINBOTHAM, JR., *Circuit Judge.*

Defendant Joseph Inadi appeals from his conviction on charges arising out of an alleged conspiracy to manufacture and distribute narcotics. Disposition of this appeal requires that we resolve a recurring question that has twice eluded determination by this

court, *see United States v. Gibbs*, 739 F.2d 838 (3d Cir. 1984) (in banc); *United States v. Ammar*, 714 F.2d 238 (3d Cir.), *cert. denied*, —— U.S. ——, 104 S. Ct. 344 (1983): Does the Sixth amendment require the government to show that a non-testifying coconspirator is *unavailable* to testify, as a foundation for admitting that coconspirator's out-of-court statements under Federal Rule of Evidence 801(d)(2)(E)? We hold that the Confrontation Clause does require such a showing, and because in our view the government has not met this burden we will reverse the judgment of the district court.

I.

Joseph Inadi was indicted in the Eastern District of Pennsylvania on charges of conspiring to manufacture and distribute methamphetamine, and on four related narcotics charges. The conspiracy count alleged that Inadi combined with John Lazaro, Jr., Michael McKeon, William Levan and other persons known and unknown. The government later named Marianne Lazaro—John Lazaro's wife—as the only additional unindicted coconspirator.

The government's case featured the testimony of two unindicted coconspirators and two Drug Enforcement Agency (DEA) agents, as well as five telephone conversations recorded through a tap on the Lazaros' phone. Unindicted coconspirator Michael McKeon testified, under a grant of use immunity, that he approached Inadi in September of 1979, when McKeon was seeking a distribution "outlet" for methamphetamine. Under an agreement they reached, Inadi was to supply cash and chemicals for the manufacture of methamphetamine and was also to be responsible for distribution, while McKeon and William Levan were to actually manufacture the substance.

McKeon testified that he and Levan made three attempts to manufacture ("cook") methamphetamine in Philadelphia between December of 1979 and April of 1980. The first cook was successful, producing three pounds of methamphetamine, which McKeon later delivered to Inadi. McKeon, Levan, and Inadi shared a profit of $19,500 on that transaction. The second cook failed to produce methamphetamine because the phenyl-2-propanol ("P2P") supplied by Inadi—a necessary ingredient—turned out to be some other substance. A third cook succeeded in producing three-and-one-half pounds of methamphetamine, which Levan delivered to Inadi.

According to McKeon, sometime after the third cook, probably in May of 1980, he went to Cape May, New Jersey with the liquid residue from the third cook. There he met Levan, Inadi, and John Lazaro, as well as two others not named as conspirators, at an empty house McKeon understood to be rented through Lazaro. They attempted to extract additional methamphetamine from the liquid residue. This "drying" resulted in less than an ounce of low quality product, which McKeon promptly sold for $200. In the early morning hours of May 23, 1980 two Cape May Police Officers surreptitiously entered the house pursuant to a warrant and removed a tray covered with drying methamphetamine. With permission of the issuing magistrate the officers delayed returning an inventory, leaving the participants to speculate over what had happened to the missing tray.

DEA agents Ellis Hershowitz and Nicholas Broughton testified that they observed a meeting between John Lazaro and Inadi on May 25, 1980. Lazaro and Inadi stood alongside Lazaro's car in the parking lot at "Frankie Masters" Restaurant in

Philadelphia and spoke for several minutes. Agent Broughton testified that he saw Inadi lean into Lazaro's car during this meeting. After Lazaro drove off the DEA agents overtook and stopped the car. They searched the vehicle, as well as Lazaro and his wife Marianne, who was a passenger at the time. Finding nothing, the agents allowed the Lazaros to leave. Some eight hours later Agent Hershowitz returned to the scene of the stop and search and found a clear plastic bag containing a small quantity of a white powder later identified by a government expert as methamphetamine.

Under a grant of use immunity, Marianne Lazaro testified that she was seated in the Lazaro car throughout the May 25, 1980 meeting between Inadi and John Lazaro. She did not see Inadi lean into the car. She further testified that after the meeting with Inadi her husband handed her a clear plastic bag containing white powder, which she put in her bra. While the DEA agents were searching the car, Marianne Lazaro removed the bag from her bra and threw it away. She denied that the bag and powder found by Hershowitz, and introduced as a government exhibit, were the items that her husband had given her.

The linchpins of the government's case were five telephone conversations recorded between May 23 and May 27, 1980 by the Cape May County Prosecutor's Office as part of their own investigation of Lazaro. The jury heard three conversations between Inadi and John Lazaro—one recorded on May 23, in which Lazaro seems to ask, in code, for a quantity of methamphetamine for the weekend, and reports on the residue missing from the Cape May house, suggesting that "Mike" probably took it; another recorded on the morning of Sunday, May 25 arranging the meeting at

Frankie Masters; and one recorded on May 27 in which Lazaro reports that he kicked "that piece" under his car during the May 25 DEA stop, and wonders how the agents were tipped off.

In a conversation between McKeon and Marianne Lazaro recorded on May 27, she describes the May 25 incident and suggests that Inadi might have set them up. McKeon assures her that Inadi was not an informant. In a May 27 conversation between John Lazaro and William Levan, there is further discussion of the missing Cape May residue (with Lazaro again suggesting that "Mike" took it), and more speculation over who set Lazaro up for the May 25 stop.

The district court admitted Inadi's recorded statements as admissions of a party-opponent under Fed. R. Evid. 801(d)(2)(A), and the recorded statements of McKeon, Levan, and the Lazaros as coconspirators' admissions under Fed. R. Evid. 801(d)(2)(E). All were received as substantive evidence over the strenuous objections of defense counsel. Shortly after listening to the May 27 Lazaro/Levan conversation for the second time, the jury returned a verdict of guilty on all counts against Inadi.

II.

In this appeal, Inadi contends: (1) that the tape recordings were inadmissible because the government failed to prove their authenticity; (2) that use of John and Marianne Lazaros' recorded statements for the truth of what they asserted was contrary to Fed. R. Evid. 801(d)(2)(E), because there was insufficient independent evidence that they were coconspirators; and (3) use of John Lazaro's recorded statements violated the Confrontation Clause, in that Laz-

aro was neither produced to testify in court nor shown to be available to testify. We will consider each of Inadi's contentions in turn.

A.

Inadi challenges the admissibility of all five tape recordings played at trial on the grounds that the government failed to meet the authentication requirements of *United States v. Starks*, 515 F.2d 112, 121 (3d Cir. 1975) (requiring the government to produce clear and convincing evidence of authenticity as a foundation for admitting tape recordings) and 18 U.S.C. § 2518(8)(a) (1982) (requiring the presence of a seal made under judicial direction, or a "satisfactory explanation for the absence thereof," as a prerequisite to using wiretap recordings as evidence). The district court rejected these contentions after a pretrial evidentiary hearing.

The record shows that the original tapes were properly sealed under judicial direction and placed in the evidence vault at the county prosecutor's office upon completion of the Lazaro wiretap on June 9, 1980, but that they were inadvertently unsealed on December 29, 1980 by Cape May County Detective Andrew R. Vaden. Detective Vaden mistook the originals for work copies that were also stored in the vault, and he played them for defense attorneys involved in related New Jersey prosecutions. The tapes were then returned to the vault and, upon discovery of the error, resealed on January 29, 1981. Inadi does not challenge the government's explanation for the inadvertent unsealing, but rather argues that there was an unexplained break in the chain of custody—another unsealing—prior to December 29. Inadi points to testimony that the tapes were originally sealed in

bundles of five, wrapped in clear cellophane (or "scotch") tape, and that all the bundles were placed in a sealed outer cardboard carton. He compares this to the testimony of Detective James R. Brennan—the evidence custodian—that when he first saw the tapes in the evidence vault on June 10, 1980 the outer carton may have been open, and the testimony of Detective Vaden that the tapes were sealed is grey "duct" tape on December 29, 1980.

We do not, however, find that the record is unambiguous as to whether the outer carton was formally sealed under judicial direction, nor do we believe that this extra precaution would be necessary. Moreover, we believe that in the light of detailed testimony that the tapes were subject to appropriate security, the district court was justified in discounting Detective Vaden's testimony regarding the type and color of the sealing tape. The very fact that Detective Vaden did not notice that, as the record clearly shows, each individual tape box and plastic reel was marked "original" suggests that his attention on December 29, 1980—nearly three years before he testified—was not focused on the physical condition of the evidence. (Detective Brennan testified that he really did not think about which set of tapes he was giving to Vaden, and Vaden testified that he assumed Brennan would not give him the originals.) The fact that the tapes were resealed with grey duct tape on January 29, 1981 might be the source of confusion. Thus, though the handling of this evidence was less than exemplary, we cannot say that the district court erred in finding that the government had met its burden under *Starks* and § 2518.

B.

Inadi next contends that the recorded statements of John and Marianne Lazaro were inadmissible hearsay. The Federal Rules of Evidence exclude from their definition of hearsay [1] any out-of-court statement that is "offered against a party and is . . . a statement by a coconspirator of a party during the course and in furtherance of the conspiracy." Fed. R. Evid. 801(d)(2)(E). This court has held that out-of-court statements may not be admitted as substantive evidence under this rule unless the government has established the existence of the alleged conspiracy and the connection of the declarant to it "by a clear preponderance of evidence independent of the hearsay declarations." *United States v. Continental Group*, 603 F.2d 444, 457 (3d Cir. 1979), *cert. denied*, 444 U.S. 1032 (1980). Without the requirement of independent proof of a conspiracy, "hearsay would lift itself by its own bootstraps to the level of competent evidence," *Glasser v. United States*, 315 U.S. 60, 75 (1942). We find that the district court applied the correct legal standard in determining the admissibility of the Lazaro statements, and our review is limited to the question of whether, viewing the evidence in the light most favorable to the government, the district court had "reasonable grounds" for concluding that, more probably than not, John and Marianne Lazaro were coconspirators. *United States v. Jannotti*, 729 F.2d 213, 218 (3d Cir. 1984), *cert. denied*, 53 U.S.L.W. 3259 (U.S. Oct. 9, 1984).

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[1] "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

Fed. R. Evid. 801(c).

In determining whether there was enough independent evidence that the Lazaros were coconspirators to bring their statements within the hearsay exception, we are mindful that "this element in the exception coincides with the elements that comprise the crime of conspiracy," Mueller, *The Federal Coconspirator Exception: Action, Assertion, and Hearsay*, 12 Hofstra L. Rev. 323, 335 (1984) (footnote omitted). We therefore review some basic principles of the substantive law of conspiracy.

The *agreement* to commit an unlawful act is itself the act proscribed by the crime of conspiracy. "It is enough if the parties tacitly come to an understanding in regard to the unlawful purpose, and this may be inferred from sufficiently significant circumstances . . . ." R. Perkins & R. Boyce, *Criminal Law* 684 (3d ed. 1982) (footnote omitted); *see also United States v. Georgia*, 210 F.2d 45 (3d Cir. 1954). The mental element of conspiracy is twofold: there must be both intent to conspire and intent to commit the underlying offense. *United States v. United States Gypsum Co.*, 438 U.S. 422, 443 n.20 (1978), "[A]iding a conspiracy with knowledge of its purposes suffices to make one a party to the conspiracy," W. LaFave & A. Scott, *Handbook on Criminal Law* 463 (1972). Finally, we note that where a number of parties combine to manufacture, distribute, and retail narcotics there is a single conspiracy—a so-called "chain" conspiracy—despite the fact that there has been no direct contact whatsoever amongst some of its links. *Id.* at 480-81.

Against this background, we cannot say that the district court lacked reasonable grounds, based on nonhearsay evidence, for concluding that the Lazaros were probably Inadi's coconspirators. There was in-court testimony that John Lazaro was present at

the Cape May drying, and that he had rented the empty house where it took place.[2] There was direct testimony of a meeting between Inadi and Lazaro, and sufficient circumstances to permit the inference that a quantity of methamphetamine passed between them on that occasion. We believe that this evidence constituted reasonable grounds for concluding that John Lazoro was probably a link in the chain of methamphetamine distribution and was therefore Inadi's coconspirator.

The nonhearsay evidence of Marianne Lazaro's participation was somewhat weaker. We have only her testimony that after the meeting with Inadi her husband asked her to hold a bag of white powder, that she put the bag in her bra, and that she threw the bag away while DEA agents were searching the Lazaro car. Though she professed not to know what the white powder was or where her husband had obtained it, when she was asked if there were "drugs in the car at the time that the Federal agents stopped the car?" she reported, "I had a white plastic bag with a white powder in it." App. at 732. We believe that her behavior could reasonably support the inference that she knowingly came to the aid of the conspiracy, and thereby became still another link in the chain that extended back to the defendant Inadi.

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[2] Inadi now contends that Michael McKeon's testimony on this point may itself have been inadmissible hearsay. We do not find, however, that defense counsel made a contemporaneous objection that would have enabled opposing counsel to clarify the source of McKeon's knowledge. We therefore deem this contention to be waived on appeal. Fed. R. Evid. 103(a). *See also* United States v. Gibbs, 739 F.2d 838, 849-50 (3d Cir. 1984) (in banc).

In addition to independent evidence that the declarants conspired with the defendant, Rule 801(d)(2)(E) requires that the proffered statements be "during the course and in furtherance of the conspiracy." There is no indication in the record that the conspiracy had been abandoned during the period of May 23-27 when the recordings were made; indeed this appears to have been a time of peak activity. We also find that the "in furtherance" requirement has been met. Two of the conversations apparently involved arrangements for a drug transaction that was an integral part of the conspiracy count. The others —although they contained some extraneous matter— served to "provide reassurance. . . . to maintain trust and cohesiveness among them, or inform each other of the current status of the conspiracy . . . ." *Ammar*, 714 F.2d at 252. We conclude, therefore, that the government laid the foundation for admission of the Lazaros' out-of-court declarations required by Fed. R. Evid. 801(d)(2)(E). We now turn to Inadi's constitutional claim.

C.

The sixth amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . . to be confronted with the witnesses against him . . . ." U.S. Const. amend. VI. Although the Confrontation Clause has never been construed to bar all use of out-of-court statements as evidence of criminal guilt, *Dutton v. Evans*, 400 U.S. 74, 80 (1970), it is clear that it imposes requirements separate from, and sometimes more stringent than, the hearsay rule and its many exceptions, *see Ohio v. Roberts*, 448 U.S. 56, 63-65 (1980). We recently acknowledged that "no exact equation exists between Fed. R. Evid.

801 and the Confrontation Clause. . . . thereby raising the possibility that evidence that satisfies Fed. R. Evid. 801(d)(2)(E) could still be deemed inadmissible under the constitutional test." *Gibbs*, 739 F.2d at 847. Inadi argues that the government, as the proponent of the tape-recorded out-of-court statements, was constitutionally required to either produce the declarants for cross-examination,[3] or to prove that they were *unavailable* to testify in court. We agree that the government must meet this burden.

In *Roberts* the Supreme Court held that "in conformance with the Framers' preference for face-to-face accusation, the Sixth Amendment establishes a rule of necessity. In the usual case . . . the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant." 448 U.S. at 65. Though the government argues that it is not required to show the unavailability of a nontestifying coconspirator-declarant, it does not suggest any reason why we should create an exception to the clear constitutional rule laid down in *Roberts*.[4] We, too, are unable to find any reason for the exception to the unavailability requirement the government would have us adopt. In-

[3] "[T]he Confrontation Clause is not violated by admitting a declarant's out-of-court statements, as long as the declarant is testifying as a witness and subject to full and effective cross-examination." California v. Green, 399 U.S. 149, 158 (1970).

[4] The Supreme Court did suggest, in a footnote, that "[a] demonstration of unavailability . . . is not always required." 448 U.S. at 65 n.7. As an example, the Court cited *Dutton*, where the "utility" of trial confrontation was "so remote that it did not require the prosecution to produce a seemingly available witness." *Id.* The government, however, does not rely on this exception, and we do not find it applicable here.

deed, with commentators increasingly of the view that the broad coconspirator exception to the hearsay rule can only be justified as a matter of necessity[5]—that is, necessitated by the difficulty of proving conspiracy and related offenses—it does not seem unreasonable to require the government to demonstrate that its hardship is real before availing itself of this tremendous evidentiary advantage. We therefore hold that the government must show that a nontestifying coconspirator is *unavailabile* to testify as a foundation for admitting that coconspirator's out-of-court statements under Fed. R. Evid. 801(d)(2)(E). *Accord, United States v. Lisotto*, 722 F.2d 85 (4th Cir. 1983), *cert. denied*, —— U.S. ——, 104 S. Ct. 1682 (1984); *United States v. Ordonez*, 722 F.2d 530 (9th Cir. 1983).

III.

The government contends that even assuming, as we have now held, that it bears the burden of producing the coconspirator-declarants or proving that they are unavailable, they have met that burden in this case. Thus we must determine what constitutes a showing of "unavailability" sufficient to satisfy the Confrontation Clause.

We believe that Fed. R. Evid. 804(a), which defines "unavailability" for the hearsay exceptions that have traditionally required such a foundation in both civil and criminal cases, is an appropriate starting point. It provides:

[5] *See, e.g.*, 4 J. Weinstein & M. Berger, *Weinstein's Evidence*, 801-169 to -171 (1981); Mueller. *The Federal Coconspirator Exception: Action, Assertion, and Hearsay*, 12 Hofstra L. Rev. 323, 335 (1984); Levie, *Hearsay and Conspiracy: A Reexamination of the Co-Conspirators' Exception to the Hearsay Rule*. 52 Mich. L. Rev. 1159, 1166 (1954).

"Unavailability as a witness" includes situations in which the declarant—

(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his statement; or

(2) persists in refusing to testify concerning the subject matter of his statement despite an order of the court to do so; or

(3) testifies to a lack of memory of the subject matter of his statement; or

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of his statement has been unable to procure his attendance . . . by process or other reasonable means.

Under *Barber v. Page*, 390 U.S. 719, 724-25 (1968), a case involving the admissibility of former testimony, "absence" of a witness will not constitute "unavailability" for purposes of applying the Confrontation Clause "unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial." In *Barber*, which arose out of a state prosecution in Oklahoma, the hearsay declarant was in a federal prison in Texas. The prosecutors did not seek a writ of habeas corpus *ad testificandum* from either the state or federal courts, although both routes were available. "The right of confrontation," the Court said, "may not be dispensed with so lightly." 390 U.S. at 725.

We believe that Rule 804(a) and *Barber*, together, establish the *minimal* showing of unavailability that

will satisfy the Confrontation Clause. It is clear that with respect to John Lazaro[6] the government has failed to meet even this minimum threshold.

The government has taken, at various stages in these proceedings, several different approaches to establishing John Lazaro's unavailability. It first asked the trial judge to rely on the assurances of government counsel that Lazaro was adamantly refusing to testify and was prepared to go to jail for contempt. Such predictions by government counsel cannot be recognized as the equivalent of the actual scenario where a witness has appeared in court and refused to testify after a court order. Every veteran trial judge has experienced the situation where a hostile witness discards his "stonewalling" tactics when faced with an imminent contempt citation.

When Lazaro failed to appear under a subpoena issued at the district court's suggestion, the government reported that he was prevented from attending by car troubles. Government counsel did not request a bench warrant, nor does it appear that they made any additional effort to compel his attendance at trial. We can safely assume that counsel's conduct would have been considerably more aggressive had counsel felt it was necessary in order to "win". Under such circumstances, counsel would have sought a bench warrant and refused to assume that the judicial process is so impotent that a witness' hostility is a basis for making no effort. Counsel's efforts here clearly do not constitute a "good faith effort" under *Barber*.

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[6] Of the other coconspirators whose out-of-court statements were used, Michael McKeon and Marianne Lazaro both testified at trial under grants of immunity, and William Levan appeared and, outside the presence of the jury, properly asserted his fifth amendment privilege.

Finally, on appeal the government asks us to take judicial notice that Lazaro probably could have asserted his fifth amendment privilege had he appeared. Even if we were inclined to consider this position, which was never asserted below, we would not find an adequate showing of unavailability absent an actual assertion of privilege and exemption by ruling of the court. Unlike defendants, witnesses have no blanket right to stand mute; we cannot say on the basis of this record that John Lazaro would have asserted the fifth amendment privilege. We conclude that the government failed to show that John Lazaro was unavailable to testify, and therefore the district court erred in admitting his out-of-court statements.[7]

CONCLUSION

For the reasons set forth above, the judgment of conviction will be reversed and the case remanded for further proceedings consistent with this opinion.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

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[7] Inadi has raised a number of other claims of error. In view of our disposition of the Confrontation Clause claim, we find it unnecessary to reach the merits of these other issues.

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 83-1882

UNITED STATES OF AMERICA

v.

INADI, JOSEPH, Joseph Inadi, APPELLANT

[Filed: Feb. 8, 1985]

ORDER AMENDING OPINION

Before: ADAMS, HIGGINBOTHAM and VAN DUSEN, *Circuit Judges*

It is ordered that the wording of the opinion filed November 13, 1984, and formerly amended on November 27, 1984, as it appears in the Federal Reporter of the West Publishing Company paperback issue of January 14, 1985 (748 F.2d No. 2 & 749 F.2d No. 1), at 748 F.2d 812-820, is further amended as follows:

In line 19 of the right-hand column on 748 F.2d 818, "establish" shall be substituted for "prove."

The following shall be added after the last sentence of part II of the opinion at 748 F.2d 819, line 17 of the left-hand column:

> "Of course, under our decision in *Gibbs*, *supra*, a defendant must make a specific and timely

objection to preserve the unavailability issue for appeal. It is clear that Inadi has done so here."

The second sentence of part III, 748 F.2d 819 shall be amended to read: "Thus we must determine what constitutes a showing of "unavailability" sufficient to satisfy the Confrontation Clause in this case."

The following shall be added after the last complete sentence of the text in the right-hand column. 748 F.2d 819: "In the context of this case, such assertions are not sufficient."

The second sentence of the first full paragraph on 748 F.2d 820 is amended to read: "For example, government counsel did not request a bench warrant, nor does it appear that they made any additional effort to compel his attendance at trial."

The following shall be added as footnote 7, following the word "privilege" on line 40 of the left-hand column, 748 F.2d 820:

> 7. Of course, we decide this case on the basis of the record before us, where the declarant had not asserted the privilege before any judicial officer or anyone authorized to take oaths. We do not deal with any exceptional circumstance where the trial judge has a record—for example, in the form of an affidavit—that clearly establishes that the declarant would claim the privilege and that requiring him to appear in court would be a meaningless formality. Thus, there is an ambit of discretion reserved to the district judge contingent upon the specific facts of the case.

Footnote 7, 748 F.2d 820, shall be renumbered as footnote 8.

BY THE COURT,

A. Leon Higginbotham, Jr.
Circuit Judge

Dated: February 8, 1985

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-1882

UNITED STATES OF AMERICA

v.

INADI, JOSEPH, Joseph Inadi, APPELLANT

(E.D. Pa. Crim. No. 83-00108-01)

[Filed Feb. 8, 1985]

SUR PETITION FOR REHEARING

Present: ALDISERT, *Chief Judge*, SEITZ, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER and VAN DUSEN, *Circuit Judges*

The petition for rehearing filed by the United States of America, appellee, in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing before the court in banc, the petition for rehearing is denied. Judge Hunter, Judge Garth, Judge Sloviter, and Judge Becker would grant the petition for rehearing.

BY THE COURT,

/s/ A. Leon Higginbotham
Circuit Judge

Dated: February 8, 1985

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No. 84-1580

In The
Supreme Court of the United States
October Term, 1984

UNITED STATES OF AMERICA,
Petitioner,

v.

JOSEPH INADI,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. WHETHER TAPED CO-CONSPIRATOR DECLARATIONS, MADE IN CODE AND NOT UNDERSTANDABLE BY THE TRIER OF FACT WITHOUT TRANSLATION, WERE ADMITTED IN VIOLATION OF THE CONFRONTATION CLAUSE WHERE THERE WAS NO SHOWING NOR EVEN MINIMAL ATTEMPT TO SHOW THAT THE DECLARANT WAS UNAVAILABLE.

II. WHETHER THE UNITED STATES, HAVING FAILED TO RAISE THE ISSUE AT ANY TIME PRIOR TO ITS PETITION FOR REHEARING, MAY NOW PROPERLY CONTEST THE LOWER COURT'S DECISION TO REMAND FOR A NEW TRIAL RATHER THAN FOR A HEARING ON THE WITNESS' UNAVAILABILITY.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

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RESPONDENT'S BRIEF IN OPPOSITION

The respondent, Joseph Inadi, respectfully requests that this Court deny the petition for a writ of certiorari, seeking review of the opinion of the Court of Appeals for the Third Circuit in this case. That opinion is reported at 748 F.2d 812 and is set forth at Pet. App. 1a-16a. The order amending the opinion (Pet. App. 17a-19a) is not yet reported.

COUNTER-STATEMENT OF THE CASE

Respondent was convicted by a jury of one count of conspiring to manufacture and distribute methamphetamine, and of four counts of related offenses. His conviction was reversed by the Court of Appeals because the government had failed to demonstrate the unavailability of a co-conspirator whose declarations were introduced at trial.[1]

The lower court's opinion, which contains a summary of the evidence at trial (Pet. App. 2a-5a), characterized five tape-recorded telephone conversations as the "linchpins of the government's case" (Pet. App. 4a). Three of these conversations were between respondent and one John Lazaro. Portions of each of these conversations were, as petitioners concede, conducted in code. (Pet. 4) Since none of the taped conversations contained any explanation of the meaning of the code, the government called two witnesses to translate it for the jury (2 Trs. 104-5; 4 Trs. 444.) Neither respondent nor Mr. Lazaro testified at trial. The fourth conversation played to the jury involved Marianne Lazaro, John Lazaro's wife, and Michael McKeon, both unindicted co-conspirators who testified at trial pursuant to grants of immunity. McKeon described the scope of the conspiracy and Mrs. Lazaro's testimony was addressed to one encounter during the conspiracy. The fifth tape recording was of a conversation between Mr. Lazaro and William Levan, an unindicted co-

[1] The opinion of the Court of Appeals is set forth in the Appendix to the government's Petition to this Court, at pp. 1-19a. References to the Appendix herein will be cited as "Pet. App. —".

conspirator. Levan did not testify at trial, having appeared out of the presence of the jury to invoke his privilege against self-incrimination. The verdict was returned shortly after the jury had requested and obtained permission to listen to the Levan-Lazaro tape a second time.

The government's failure to produce John Lazaro for cross-examination or to demonstrate his unavailability was the subject of objection by respondent on the ground that the introduction of Lazaro's statements in four of the five recorded conversations violated rights secured by the Confrontation Clause. The government took the position at the trial that it did not have to show Lazaro's unavailability (3 Trs. 288). The government's attorney represented to the district court that Lazaro had advised her that he would refuse to testify if called, despite her warnings that if he did so he faced penalties for contempt (3 Trs. 292).

The district court did not, as the government asserts at pages 5-6 of its Petition to this Court, admit the conversations "in reliance on the government's representation that Lazaro would refuse to testify whether or not he had a valid Fifth Amendment privilege and was therefore unavailable." Rather, the trial court conditionally admitted the conversations in reliance on the prosecutor's representation that she would produce Lazaro and that he would refuse to testify (3 Trs. 292-293). The government made no claim at trial that Lazaro could have claimed the Fifth Amendment as a basis for refusing to testify. That contention was raised first in its brief to the court of appeals. Indeed, the prosecutor opined at trial that Lazaro had no such claim of privilege (4 Trs. 408), and explained his absence as "apparently" due to "car prob-

lems'' (*Id.*). The trial court then expressly agreed to hear Lazaro out of the presence of the jury upon his arrival (*Id.*). The govenment did not at any time call Lazaro to testify at the hearing out of the jury's presence. At no time did the trial court, as the government's Petition suggests, rule that the government had made sufficient representations to establish that witness' unavailability. The order finally admitting the Lazaro conversations contained no response to respondent's continuing objection to the failure to produce him for cross-examination (5 Trs. 574-575).

On this record, the court of appeals ruled that admission of the Lazaro conversations was error, despite their qualification as co-conspirator declarations under Fed. R. Evid. 801 (d)(2)(E), because the government had failed to make the "*minimal* showing of unavailability that will satisfy the Confrontation Clause" (Pet. App. 14a-15a) (emphasis in original). The opinion sets forth three alternative ways to make the requisite minimal showing, none of which was pursued by the government at the trial of this case: demonstration of a good faith effort on the part of the government to secure the witness' attendance at trial; production of the witness to invoke a claim of privilege; or production of a record, such as affidavit from the declarant, which establishes both that he will claim the privilege and that requiring his actual appearance would be a meaningless formality (Pet. App. 15a-16a, 18a).

The government petitioned for rehearing, challenging the holding of the court and urging in the alternative, for the first time, that the proper remedy was a remand for

a hearing on Lazaro's unavailability rather than a new trial. The petition for rehearing was denied.

REASONS FOR DENYING THE WRIT

1. This case presents a straightforward application of the principles embodied in the Confrontation Clause of the Sixth Amendment and expounded by this Court in *Ohio v. Roberts,* 448 U.S. 56 (1980). The court below considered the constitutional propriety of the prosecution's use of out-of-court statements of a witness where the witness was not called to testify and was not shown to be unavailable, and where the utility of trial confrontation was uncontested. The statements, in this case tape-recorded telephone conversations, were in code.

Relying principally on *Roberts,* the court of appeals held that in the circumstances of this case the introduction of the out-of-court statements violated the Confrontation Clause. Before reaching that issue, the court held that the statements in question were declarations of a co-conspirator and admissible under Fed. R. Evid. 801 (d)(2)(E).

The holding of the court of appeals is much narrower than is suggested by the petition of the United States. The court did not directly or by necessary implication hold that Rule 801 (d)(2)(E) was unconstitutional, nor did it have occasion to rule on the applicability of the Confrontation Clause to Rule 803. This case concerns only the application of the Confrontation Clause to statements admissible under Rule 801 (d)(2)(E). It concerns

a specific factual situation where the utility of trial confrontation was apparent and not contested by the government.

In cases to which the holding below does apply, the burden of which the government complains is modest. If the issue of availability of a witness is properly raised through a specific and timely objection, the prosecution is required either to show a good-faith effort to produce the witness for cross-examination or to demonstrate the unavailability of the witness. In this case the government did show the unavailability of one witness without apparent difficulty. Unavailability may be shown by a properly drawn affidavit from the witness.[2]

2. The opinion below faithfully applies previous decisions of this Court which make clear that the evidentiary rules governing admissibility of out-of-court statements and the Confrontation Clause are not exact equivalents. *Ohio v. Roberts,* 448 U.S. 56 (1980); *Dutton v. Evans,* 400 U.S. 74 (1970); *California v. Green,* 399 U.S. 149 (1970). It has long been recognized that statements admissible as exceptions to the bar against hearsay may be barred by virtue of a defendant's right to confront the witnesses against him. See *Barber v. Page,* 390 U.S. 719 (1968); *Pointer v. Texas,* 380 U.S. 400 (1965). Similarly, out-of-court statements of an unavailable witness, while raising no Confrontation Clause issue, may or may not be considered inadmissible hearsay depending on the manner and

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[2] Given the court of appeals' suggestion that an affidavit concerning unavailability would suffice in relieving the government of Confrontation Clause problems, we have difficulty in understanding the United States' position that the holding is "burdensome and controversial." (Pet. 8.)

occasion of their utterance. Although the non-coextensive nature of the Clause and the Rules require separate analysis, the proposed justification for admission of an out-of-court statement is significant for both.

a. The Confrontation Clause provides that: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ." It is designed to protect an accused individual from conviction on the basis of out-of-court testimony, without benefit of cross-examination:

> the particular vice that gave impetus to the confrontation claim was the practice of trying defendants on "evidence" which consisted solely of ex parte affidavits or depositions . . . thus denying the defendant the opportunity to challenge his accuser in a face-to-face encounter in front of the trier of fact. . . .
>
> "The proof was usually given by reading depositions, confessions of accomplices, letters and the like. . . ."

California v. Green, supra, 156-57 (quoting 1 J. Stephen, A History of the Criminal Law of England 326 (1883)). *See also Douglas v. Alabama,* 380 U.S. 415, 418 (1965). In confronting witnesses, the defendant has the benefit of

> a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.

Mattox v. United States, 156 U.S. 237, 242-43 (1895).

At issue in this case is the right of a defendant to cross-examine a witness against him. John Lazaro, through

the tape recordings introduced into evidence, was a critical witness against respondent, just as Cobham, through depositions introduced at trial, was a witness against Sir Walter Raleigh. 1 Stephen, *supra,* 333-336. The issue is distinct from that of compulsory process, or of responsibility for calling a witness equally available to both parties. The government seeks, in this instance, to avail itself of Lazaro's testimony without providing the defendant an opportunity to cross-examine him before a jury in order to question the meaning, reliability, credibility and accuracy of his statements.

b. At issue here are out-of-court statements which, by definition, are not hearsay. Rather, they were admitted under Rule 801 (d)(2)(E), which provides:

A statement is not hearsay if—

. . .

> (2) . . . The statement is offered against a party and is . . . (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

The non-hearsay status of co-conspirator statements rests in part on an extension of the rule allowing for introduction of admissions of a party opponent, on the theory that each co-conspirator is the agent of every other co-conspirator. *See* Davenport, The Confrontation Clause and the Co-Conspirator Exception in Criminal Prosecutions: A Functional Analysis, 85 Harv. L. Rev. 1378, 1384-85 (1972). The rule providing for the admissibility of co-conspirator statements does not embody a judgment that they are likely to be reliable because of the circumstances in which they are made, nor does it rest on the

fact that proof of the out-of-court statement is the only method of putting the evidence before the jury because of the unavailability of the live witness.

Statements admissible under Rule 801 (d) (2)(E) are often without any hint of reliability. Statements in furtherance of a conspiracy may include statements between co-conspirators which are designed to maintain the spirits of the co-conspirators. There is no analytical reason to assume that such statements would be truthful or accurate. Often co-conspirators deliberately mislead each other in their efforts to encourage continued cooperation in the conspiracy.[3]

As to many such statements, the likely utility of cross-examination is apparent. A defendant's ability to explore the reasons leading a co-conspirator to make particular statements could entirely alter the weight accorded them by the trier of fact. Similarly, the potential prejudice from their admission without the opportunity to cross-examine the declarant is obvious, as is the prejudice from admission, without confrontation, of discussions in code.

The government's petition fails to take note of the differences between Rule 801 (d)(2)(E) and Rule 803. The classification of co-conspirator's statements as non-hearsay, rather than as an exception to the general rule,

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[3] One of the critical conversations in this case takes place following a DEA stop of the Lazaros. In speculating about the implications of DEA's activities on the conspiracy, Lazaro makes representations to Levan which are contrary to the testimony of other co-conspirators. The theory of admission of these statements, which are obviously of questionable reliability, was that they were made in an effort to maintain the co-conspirator's confidence in Lazaro, and thus maintain the conspiracy.

reflects a significant theoretical distinction between co-conspirators' statements and traditional hearsay.

The government is wrong in its assertion that the opinion below requires analysis of the application of the Confrontation Clause to Rule 803. That issue is not raised in this case. Other Courts of Appeals have held that evidence admissible under the Federal Rule of Evidence 803 may be inadmissible under the Confrontation Clause. *See, e.g., Haggins v. Warden,* 715 F.2d 1050, 1055 (6th Cir. 1983) (excited utterance), *cert. denied,* — U.S. —, 104 S.Ct. 980 (1984); *Hutchins v. Wainwright,* 715 F.2d 512, 516 (11th Cir. 1983) (statement of anonymous informant to police), *cert. denied,* — U.S. —, 104 S.Ct. 1427 (1984); *United States v. Washington,* 688 F.2d 953, 959 (5th Cir. 1982) (business records); *Lenza v. Wyrick,* 665 F.2d 804, 810-11 (8th Cir. 1981) (exception for "state of mind"); *Williams v. Melton,* 733 F.2d 1492, 1496 (11th Cir.) (res gestae), *cert. denied,* — U.S. —, 105 S.Ct. 567 (1984). In each of these instances, the holding is clearly derived from a careful reading of this Court's opinion in *Roberts.* None of them led to an evisceration of Rule 803. There is no reason to expect that this case will do so.

Rule 803's exceptions to the general bar against hearsay are grounded in the notion that the circumstances leading the declarant to speak also provide a sound basis for inferring the reliability and accuracy of the statement.[4]

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[4] If a defendant produces evidence which undermines the reliability of an 803 statement, the statement may not be admitted even though it is in technical compliance with a listed

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(Other exceptions, included under Rule 804, are based on the recognition that it is sometimes impossible to bring the declarant before the trier-of-fact and that the out-of-court statements are made under circumstances which offer some assurance of their reliability.[5]) An analysis of the application of the Confrontation Clause to Rule 803 must take into account the inherent reliability of the statements admitted under this rule.

In a criminal case, Rules 803 and 804 protect the government's interest in using the out-of-court declarations once it meets the obligation of affording the right to confrontation. Declarations within the exceptions listed under Rule 804 are admissible only when the declarant is unavailable. Declarations within the exceptions catalogued at Rule 803 are admissible "even though the declarant is available as a witness."[6] A determination that, in a particular case, the Confrontation Clause requires the government to produce a declarant or demonstrate unavailability before using the declarant's out-of-court state-

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exception. Generally, the reliability is presumed if the out-of-court declaration falls within an exception. If the reliability of the statement is called into question, the presumption of reliability alone may not be a sufficient basis for the statement's admission. This is in sharp contrast to co-conspirator's statements, which are admissible even in the face of evidence that they are in fact unreliable. *See McCormick's Handbook on the Law of Evidence* (E. Cleary 2d ed. 1972).

[5] If statements are admissible under Rule 804, then the unavailability of the declarant will have been demonstrated and there will generally be no Confrontation Clause issue.

[6] Were it not for this provision of Rule 803 once the government produced the declarant of a Rule 803 statement, the out-of-court statement would become inadmissible.

ment does not drain Rule 803 of substance. Neither does it lead towards the proposition that the Confrontation Clause bars the use of hearsay at a criminal trial. On the contrary, it highlights Rule 803's function—to provide for the admission of hearsay once the constitutional requirements have been met.

3. The decision below does no violence to this Court's repeated admonitions that a demonstration of unavailability need not be made where the utility of such confrontation is remote. *See Ohio v. Roberts,* 448 U.S. 56, 65 n.7. (1980); *Dutton v. Evans,* 400 U.S. 74 (1970). Indeed, the court below took note of that exception to the availability requirement, despite the fact that the United States had failed to argue either at trial or on appeal that the exception was applicable to this case. (Pet. App. 12a n.4.) ("The government, however, does not rely on this exception and we do not find it applicable here.")

4. Even in cases falling within the narrow category at issue here, the burden on the government is slight. If the witness is unavailable, the government is obliged to demonstrate unavailability as it did with William Levan at trial. This need not require any extensive proceeding. Indeed, in the opinion below, the court stated that properly-drawn affidavits could serve to meet the government's burden. (Pet. App. 18a, n.7)

If the witness is in fact available, then the government must call the witness to testify. The requirement that the government produce the maker of the out-of-court statements, as its witness during its case, is the essence

of the Confrontation Clause.[7] Production of the witness in no way precludes the use of the out-of-court statements. In the absence of Rule 801 (d)(2)(E) the government would be obliged to rely solely on the live testimony of the co-conspirator. Rule 801 (d)(2)(E) allows the government to introduce in addition the out-of-court statements of the witness, in this case tape-recorded conversations.

5. The second question presented by the United States in its petition—the appropriateness of a remand for a hearing on the unavailability of the witness in question—is not addressed in the opinion below. The United States never raised the issue until its Petition for Rehearing and Suggestion for Rehearing In Banc.[8] "Ordinarily, this Court does not decide questions not raised or resolved in the lower court." *Youakim v. Miller,* 425 U.S. 231, 233-34 (1976). *See also United States v. Lovasco,* 431 U.S. 783, 788-89 (1977); *Usery v. Turner Elkhorn Mining Company,* 428 U.S. 1, 37-38 (1976); *Singleton v. Wulff,* 428

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[7] The United States speculates at page 16 of its petition that if a witness is not called it is usually because: the witness is certain to invoke the Fifth Amendment or otherwise refuse to testify; or he is truly beyond the law's reach; or the government cannot rely upon the witness' testimony, since he still is in league with the defendant. The first two reasons cited need not long detain us, since in each circumstance the government can simply demonstrate the witness' unavailability. As to the third reason, we can see no basis in the history of Confrontation Clause jurisprudence to permit the admission of out-of-court declarations because the government does not believe that the witness, if presented live, will testify consistently with the prior statement. It seems to us that such justifications raise concerns which are precisely those which the Clause was designed to guard against.

[8] It is unclear whether the issue at such a hearing would be the present availability of Lazaro or his availability at the time of the trial in October, 1983.

U.S. 106, 120 (1976). The remedy now sought by the United States is neither simple nor expeditious. Because the issue was not properly raised, the scope and purpose of such a hearing are ill-defined and raise factual issues not addressed by the parties.[9]

The suggestion that the Court remand for a hearing is without merit. The government was advised at trial that it should produce the witness. It chose not to do so, representing only that he "apparently" had "car trouble." A hearing now—whether on present or past unavailability—would be completely inadequate. There is no allegation that the witness was physically unavailable. Rather, in addition to "car trouble", the government has represented that he would suffer a judgment of contempt rather than testify.[10]

Whether or not Lazaro would have gone to contempt at time of trial, or whether or not he will choose to go to contempt at a new trial, is not capable of determination now.[11] In this instance the hearing requested by the government would be meaningless.[12]

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[9] The government's failure to raise this issue at any time before its petition for rehearing suggests that it is not a recurring problem. Had it been so, it would be reasonable to expect that the government would request the relief it now seeks from the outset of the litigation.

[10] The Fifth Amendment claim was never made at trial. Thus, it is not properly before the court now.

[11] As the court below noted, any such determination of the witness' likely response to a threat of contempt would be based on speculation: "Every veteran trial judge has experienced the situation where a hostile witness discards his 'stonewalling' tactics when faced with an imminent contempt citation" (Pet. App. 15a).

[12] In this case, where several conversations were partly in code, where one statement involved allegations which were

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CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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inconsistent with other trial evidence, and where the government does not contest the utility of confrontation, there is no likelihood that the district court would find beyond a reasonable doubt that cross-examination of Lazaro would not have been useful at trial.

(3)

No. 84-1580

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JOSEPH INADI

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

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10 pp

TABLE OF AUTHORITIES

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1. Respondent has not provided any basis for declining review in this case. Respondent does not dispute the fact that the courts of appeals are sharply divided about the application of the Confrontation Clause to co-conspirator statements (see Pet. 8-10).[1] Nor does respondent deny that similar division and uncertainty exist at the state level (see Pet. 10-11).

Moreover, contrary to respondent's suggestion, the practical importance of the first issue presented in this case is evident. Respondent argues (Br. in Opp. 5) that the court of

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[1]In addition to the cases cited in the petition, the decision below flatly conflicts with *United States* v. *Molt*, No. 85-1085 (7th Cir. Apr. 1, 1985), slip op. 2-3 (admission of co-conspirator statements without showing of unavailability did not violate Confrontation Clause; Confrontation Clause imposes no requirements beyond co-conspirator rule), and *Boone* v. *Marshall*, No. 84-3536 (6th Cir. Apr. 29, 1985), slip op. 3-4 (same).

appeals' holding "concerns only the application of the Confrontation Clause to statements admissible under Rule 801(d)(2)(E) [the co-conspirator rule]" and not the hearsay exceptions in Fed. R. Evid. 803. Even if respondent were correct, the effect on co-conspirator statements is alone more than enough to justify review. The decision of the court of appeals dramatically restructures the traditional co-conspirator rule by requiring the government to produce the co-conspirator for cross-examination or prove that he is unavailable to testify before his out-of-court statements may be introduced. "The great importance of coconspirator statements in federal practice is attested by the fact that Rule 801(d)(2)(E) is *by far the single most cited provision in Article VIII*, judging from the reported cases." 4 D. Louisell & C. Mueller, *Federal Evidence* § 427, at 331 (1980) (emphasis added). The court of appeals' decision is thus a matter of unmistakable importance.

Furthermore, respondent's constricted interpretation of the court of appeals' holding is plainly unsound. Respondent relies (Br. in Opp. 8-12) on the fact that co-conspirator statements are not hearsay under the Federal Rules of Evidence (Rule 801(d)(2)(E)). But the cornerstone of the court of appeals' decision (see Pet. App. 12a) is dictum in *Ohio* v. *Roberts*, 448 U.S. 56 (1980), concerning the application of the Confrontation Clause to *hearsay*. In *Roberts*, the Court wrote (*id.* at 65 (emphasis added)):

> The Confrontation Clause operates in two separate ways to restrict the range of admissible *hearsay*. First, * * * [i]n the usual case * * *, the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant.

The Court reiterated (*id.* at 66 (emphasis added)):

> [W]hen a *hearsay* declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable.

Thus, if it matters for present purposes that co-conspirator statements are not hearsay under the Federal Rules of Evidence, it would follow that the *Roberts* dictum does not apply, and the principal, if not exclusive, support for the court of appeals' holding would be removed.

The Third Circuit understood this point and has firmly rejected reliance on the status of co-conspirator statements as non-hearsay. In *United States* v. *Caputo*, No. 82-1791 (Mar. 29, 1985), slip op. 14, in which the court reversed a conviction based on *Inadi*, Judge Higginbotham, *Inadi's* author, wrote: "The mere fact that the drafters of the Federal Rules opted to make coconspirator statements an exception to the definition of hearsay, rather than an exception to the rule excluding hearsay, Fed. R. Evid. 802, is of no consequence in applying the Confrontation Clause." This demonstrates that the court of appeals' reasoning applies to all traditionally admissible categories of hearsay as well as to co-conspirator statements.

We wish to make it clear that we agree with respondent, and disagree with the court of appeals, that the status of co-conspirator statements as non-hearsay is indeed significant for present purposes. Many co-conspirator statements, including many of those at issue in this case (see Pet. App. 4a-5a), are not introduced for the truth of the matter asserted and thus would fall outside the hearsay rule (see Fed. R. Evid. 801(c)) even without the special exemption of Fed. R. Evid. 801(d)(2)(E). See 4 D. Louisell & C. Mueller, *supra*, § 427, at 357-362. And as this Court recently explained, admission of non-hearsay "raises no Confrontation Clause concerns." *Tennessee* v. *Street*, No. 83-2143 (May 13, 1985), slip op. 5.

Respondent contends (Br. in Opp. 5-6) that the court of appeals' decision is "much narrower" than suggested in the petition because proof of unavailability may not be necessary "where the 'utility' of trial confrontation" is very "remote" Pet. App. 12a n.4, quoting *Roberts*, 448 U.S. at 65 n.7. At best, however, this is a very narrow exception to the court of appeals' holding; it appears to be little more than a variant of the harmless error rule.[2]

Respondent is also wrong in asserting (Br. in Opp. 12) that the court of appeals' holding will place only a "slight" burden on the government. At a minimum, the court of appeals' holding "increases the number of declarants who must mechanically appear at trial and thereby complicates and protracts the proceedings." *Caputo*, slip op. 24 (Sloviter, J., dissenting). But we think that the court of appeals' decision may have graver implications. Non-testifying co-conspirators are frequently hostile to the prosecution and are sometimes still in league with the defendant. Thus, it is entirely predictable that many co-conspirators will not cooperate with prosecutorial efforts to produce them at trial or prove their unavailability. Even where their right and intention to claim the Fifth Amendment privilege are apparent, they will often refuse to assist the government by executing affidavits to that effect. And even when subpoenaed to appear at trial, they will fail to appear—as did Lazaro in this case—claiming various excuses. The burden

[2]The dictum in *Roberts* (448 U.S. at 65 n.7) on which the court of appeals relied was based in turn on *Dutton* v. *Evans*, 400 U.S. 74 (1970), where the plurality opinion rejected as "wholly unreal" the suggestion that the defendant might have profited from cross-examination of the declarant whose out-of-court statement was introduced against him (*id.* at 89). Two of the five members of the majority, including Justice Blackmun, the author of *Roberts*, thought that the case could have been decided on harmless error grounds (*id.* at 90-93) (Blackmun, J., concurring).

on the prosecution of securing the presence of these declarants in the courtroom or of conducting a thorough search sufficient to establish that they have disappeared and are thus unavailable, and on the courts of litigating the issue, will be anything but "slight," as the controversy in *Roberts* over the unavailability of the declarant there demonstrates.

We also doubt that the court of appeals has thought through the consequences of its ruling when the co-conspirator/declarant is produced and does not claim the Fifth Amendment privilege. The court of appeals held that the co-conspirator must be "produce[d] * * * for cross-examination." Pet. App. 12a; see also *Caputo*, slip op. 15. Does this mean that the government must conduct a direct examination of a co-conspirator who may well be in the defense camp? What questions must be asked? If the court of appeals' decision requires the prosecution to do anything more than produce the co-conspirator, it constitutes a severe intrusion upon prosecutorial prerogative.[3] On the other hand, if mere production is all that is required, why must the prosecution shoulder the burden of producing a

[3]Non-cooperating co-conspirators will often deny or offer an exculpatory explanation for incriminating statements made in furtherance of the conspiracy. Where this is so, their testimony will not be wanted by the prosecution. Faced with a situation in which the prosecution has no desire to conduct a direct examination, a district court would be well advised to reverse the order of interrogation (Fed. R. Evid. 611). The defense would then have the opportunity on direct examination to elicit an exculpatory denial or explanation of the incriminating statements, and the prosecution would be allowed to cross-examine. However, if this is the result anticipated by the court of appeals, we fail to see why the defense should not be required to arrange for the co-conspirator's presence rather than placing the burden on the government.

On the other hand, if the court of appeals meant to require the government to conduct a direct examination of these unwanted witnesses, disruption of the prosecution's case and jury confusion would be likely to result. In many instances, the government will have to seek leave to question the co-conspirator/declarant as a hostile witness (Fed. R. Evid. 611(c)). In effect, the government will have to cross-examine

witness who is equally available to both sides and may indeed be cooperating with the defense? And if the government does not question the co-conspirator/declarant on direct, what form will the cross-examination be permitted to take?

2. We will not address at length respondent's defense of the court of appeals' decision. It is worth noting, however, that respondent has not even attempted to explain what would be gained by re-examining under the aegis of the Confrontation Clause the traditional treatment of declarant availability in the exceptions to the hearsay rule.

3. Finally, respondent contends (Br. in Opp. 13-14) that the government waived its right to object to the relief ordered by the court of appeals—a new trial—because the government did not address this issue until after the court's decision was announced. This is surely an extreme application of the rule that arguments ordinarily should not be raised for the first time on rehearing. Until the court of appeals handed down its decision, the government did not know whether the court would find a Confrontation Clause violation, much less that it would order what in our view is entirely inappropriate, wasteful, and excessive relief. We are not aware of a rule requiring appellees to anticipate and brief all forms of unwarranted relief that an appellate court might impose.

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the co-conspirator about his out-of-court statements before the anticipated exculpatory denial or explanation is elicited. Indeed, the government will be in the position of having to conduct a cross-examination even though the defense will be under no obligation to question the witness at all. Such a confused procedure would be "at odds with the Confrontation Clause's very mission—to advance 'the accuracy of the truth-determining process in criminal trials.' " *Tennessee* v. *Street*, slip op. 6, quoting *Dutton* v. *Evans*, 400 U.S. at 89.

For these reasons and those set out in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

REX E. LEE
Solicitor General

MAY 1985

No. 84-1580

In the Supreme Court of the United States

OCTOBER TERM, 1985

UNITED STATES OF AMERICA, PETITIONER

v.

JOSEPH INADI

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED APRIL 4, 1985
CERTIORARI GRANTED MAY 28, 1985

TABLE OF CONTENTS *

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* The opinion of the court of appeals is printed in the appendix to the petition for a writ of certiorari and has not been reproduced.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

No. 83-00108

UNITED STATES OF AMERICA

v.

JOSEPH INADI

RELEVANT DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
1983		
Mar. 23	1	True Bill.
" 23	2	MOTION & ORDER FOR BENCH WARRANT, FILED. Warrant Exit. Bail to be entered in the amount of $50,000.00 with surety.
" 23	3	ORDER THAT DOCKET PAPERS ARE SEALED & IMPOUNDED, FILED. PBS
" 23	4	Letter unimpounding Indictment, filed.
" 24	5	Bail Status Sheet setting bail in sum of $50,000—O.R., filed. PBS
" 24	6	Appearance of M. Maquigan, Esq. for deft., filed.
" 24	—	Bond of deft. in sum of $50,000—O.R., filed.
" 31	7	PLEA: NOT GUILTY to Cts. 1 thru 5. Ten days to file motions. Trial set for 5-23-83, filed. WFH

DATE	NR.	PROCEEDINGS
1983		
Apr. 11	8	STIPULATION AND ORDER THAT TIME FOR FILING OF DEFT'S PRETRIAL MOTIONS IS EXTENDED UNTIL 4-25-83, ETC., FILED. RJB 4-12-83 entered & copies mailed.
" 12	9	Warrant returned "on 3-24-82 executed" and filed.
" 25	10	MOTION OF DEFT. FOR DISCLOSURE OF ELECTRONIC SURVEILLANCE AND MEMO, FILED.
" 25	11	MOTION OF DEFT. FOR A BILL OF PARTICULARS AND MEMO, FILED.
" 25	12	MOTION OF DEFT. TO DISCLOSE INFORMATION REGARDING PROCEEDINGS BEFORE OR ANCILLARY TO THE GRAND JURY AND MEMO, FILED.
" 25	13	MOTION OF DEFT. TO SUPPRESS EVIDENCE, REQUEST FOR NOTICE OF INTENT TO USE EVIDENCE, AND MOTION FOR RETURN OF PROPERTY AND MEMO, FILED.
" 25	14	MOTION OF DEFT. TO DISMISS INDICTMENT AND MEMO, FILED.
May 3	15	ORDER THAT EXCLUDABLE TIME BE COMPUTED FROM DATE OF FILING OF MOTION OF DEFT. TO DISCLOSE INFORMATION, ET AL, FILED. CLK. 5-3-83 entered & copies mailed
" 9	16	Govt's answer to motion to dismiss indictment and memo, filed.

DATE	NR.	PROCEEDINGS
1983		
" 9	17	Govt's answer to motion to suppress evidence, request for notice of intent to use evidence, and motion for return of property and memo, filed.
" 9	18	Govt's answer to motion for a bill of particulars and memo, filed.
" 9	19	Govt's answer to motion to disclose information regarding proceedings before or ancillary to the Grand Jury and memo, filed.
" 11	20	Govt's answer to motion for disclosure of electronic surveillance, affidavit, inventory and memo, filed.
" 18	21	MOTION OF DEFT. FOR FURTHER ELECTRONIC SURVEILLANCE DISCOVERY, FILED.
" 18	22	MOTION OF DEFT. FOR TRIAL CONTINUANCE, FILED.
" 23	23	ORDER THAT CASE IS REASSIGNED FROM THE CALENDAR OF THE HON. RAYMOND J. BRODERICK TO THE CALENDAR OF THE HON. JAMES T. GILES, FILED. 5-23-83 entered & copies mailed. AL
Jun 3	24	ORDER THAT A HEARING ON ALL OUTSTANDING MOTIONS IS SET DOWN FOR 7-1-83, FILED. 6-3-83 entered & copies mailed. CLK.
" 20	25	MOTION OF GOVT. FOR A HEARING PURSUANT TO PROVISIONS OF 28:455(e) AND MEMO, FILED.
Jul 1	26	Govt's response to motion for further electronic surveillance discovery, filed.

DATE	NR.	PROCEEDINGS
1983		
" 6	27	Hearing of 7-5-83 re recusal motion of the Govt.—Court will transfer case to another Judge of this Court, filed.
" 11	28	ORDER THAT CASE IS REASSIGNED FROM THE CALENDAR OF THE HON. JAMES T. GILES TO THE CALENDAR OF THE HON. CLIFFORD SCOTT GREEN, FILED. 7-11-83 entered & copies mailed AL
" 14	29	ORDER THAT A MOTION AND STATUS CONFERENCE IS SCHEDULED FOR 7-19-83, FILED. 7-15-83 entered & copies mailed CG
Jul 21	30	Letter to Judge Green from H. Maquigan, Esq. re request for a continuance of conference scheduled for 7-19-83, filed.
" 21	31	ORDER THAT MOTION AND STATUS CONFERENCE IS CONTINUED UNTIL FURTHER NOTICE AT REQUEST OF HOLLY MAQUIGAN, ESQ., ETC., FILED. 7-22-83 entered & copies mailed
" 27	32	ORDER THAT A MOTION AND STATUS CONFERENCE IS SCHEDULED FOR 8-29-83, FILED. 7-27-83 entered & copies mailed. CG
Aug. 23	33	MOTION & ORDER THAT THE OFFICE OF THE PROSECUTOR FOR CAPE MAY COUNTY, NEW JERSEY, DELIVER TO S.A. ELLIS HERSHOWITZ OF THE D.E.A. THE ORIGINAL TAPES RESULTING FROM THE COURT-ORDERED ELECTRONIC SURVEILLANCE ON THE TELEPHONES OF JOHN LAZARO, FILED. CG 8/23/83 entered & copies mailed.

DATE	NR.	PROCEEDINGS
1983		
" 23	34	DEFT'S MOTION TO COMPEL PRETRIAL DISCLOSURE OF DISCOVERY MATERIALS, MEMORANDUM, CERTIFICATE OF SERVICE, FILED.
" 30	35	Argument of 8-29-83 re motion of deft. for bill of particulars—Granted in part; motion of deft. to disclose information regarding proceedings before or ancillary to the Grand Jury—C.A.V; motion of deft. to dismiss indictment—C.A.V.; motion of deft. for further electronic surveillance—C.A.V.; motion of deft. to suppress evidence, request for notice of intent to use evidence and motion for return of property—Withdrawn in part—C.A.V., filed.
" 30	36	ORDER THAT THE 39 REELS OF SEALED TAPES GENERALLY REFERRED TO AS THE CAPE MAY WIRE OR WIRE TAPS "WT 1" AND "WT 2" MAY BE UNSEALED AND PLAYED FOR THE BENEFIT OF THE DEFT. AND THE GOVT., FILED. 8-30-83 entered & copies mailed. CG
" 31	37	MOTION OF GOVT. TO ADMIT TAPE RECORDINGS, FILED.
Sep. 20	38	Transcript of 8-29-83, filed.
" 28	39	PETITION AND ORDER THAT THE SUPT. OF LEESBURG STATE PRISON, LEESBURG, N.J. AND THE U.S. MARSHAL FOR THE EAST. DIST. OF PA. PRODUCE G. POLLACCO AT THE U.S. MARSHAL'S OFFICE ON OCT. 4, 5, 6 & 7, 1983, FILED. CG
Sep. 29	40	Letter Memo to Judge Green from H. Maguigan, Esq. re points and authorities, filed.

DATE	NR.	PROCEEDINGS
1983		
" 29	41	Letter to Judge Green from J.K. Damirgian, AUSA re response to letter memo of deft., filed.
" 29	42	Affidavit of J. K. Damirgian, AUSA, filed.
" 29	(37)	ORDER OF COURT RE: Govt. Exhibits T-1 thru T-6 and transcripts, filed. 9-30-83 entered & copies mailed. CG
" 29	43	REPORT OF SPEEDY TRIAL ACT DELAY—ON 8-29-83 HEARING ON DEFT'S MOTIONS TO DISCLOSE INFORMATION, ET AL—C.A.V., FILED. CG 9-30-83 entered & copies mailed.
" 29	44	ORDER DENYING MOTION OF DEFT. TO COMPEL DISCOVERY; DENYING MOTION FOR FURTHER ELECTRONIC SURVEILLANCE DISCOVERY AND FOR "7-AGENCY CHECK", ETC.; TRIAL SCHEDULED TO COMMENCE ON 10-6-83, FILED. 9-30-83 entered & copies mailed. CG
Oct. 7	45	TRIAL OF 10/6/83-Counsel requests trial to be continued to 10/24/83, due to unavailability of Ms. Maguigan; Deft. sworn waives his rights f/speedy trial; Court GRANTS request to reschedule trial to 10/24/83, filed.
" 7	46	ORDER THAT THE ACTION CANNOT PROCEED TO TRIAL AND MUST BE CONTINUED BECAUSE OF THE UNAVAILABILITY OF COUNSEL FOR DEFT., TRIAL CONTINUED BECAUSE OF THE UNAVAILABILITY OF COUNSEL FOR DEFT., TRIAL CONTINUED TO 10/24/83, ETC., FILED. CG 10/11/83 entered & copies mailed.

DATE	NR.	PROCEEDINGS
1983		
Oct. 18	47	SUPPL. MOTION OF DEFT. FOR A BILL OF PARTICULARS AND MEMO, FILED.
" 24	48	PETITION AND ORDER THAT THE SUPT. OF THE LEESBURG STATE PRISON LEESBURG, NEW JERSEY AND THE U.S. MARSHAL FOR THE EAST. DIST. OF PA. PRODUCE G. POLLACCO AT THE U.S. MARSHAL'S OFFICE ON OCT. 25, 26 & 27, 1983, FILED.
" 25	49	Jury called and sworn. TRIAL—witness sworn, filed.
" 27	50	Trial of 10-26-83 resumes, filed.
" 27	51	Deft's requested points for charge, filed.
" 31	52	Trial of 10-28-83 resumes, filed.
Nov. 1	53	Waiver of presence of court stenographer at drawing of jury panel members, filed.
" 1	54	Trial of 10-31-83 resumes, filed.
" 1	55	Govt's requested points for charge, filed.
" 1	56	Order to furnish beverages for jurors, filed.
" 1	57	Order to furnish lunch for jurors, filed.
" 3	58	Trial of 11-1-83 resumes, filed.
" 3	59	Trial of 11-2-83 resumes. VERDICT: GUILTY to Cts. 1 thru 5. Sentence set for 11-30-83, filed.
" 2	60	ORDER SEALING EXHIBIT D-4 WHICH IS PART OF EVIDENCE PRODUCED IN TRIAL OF ACTION, ETC., FILED. CG

DATE	NR.	PROCEEDINGS
1983		
Dec. 1	61	SENTENCE OF 11-30-83: Cts. 1 thru 5—Impr. 3 yrs. con. and become eligible for parole under 18:4205 (b) (2) immediately and S.P. 7 yrs. as to Ct. 5, filed.
" 1	62	JUDGMENT AND COMMITMENT ORDER, FILED. 12-1-83 entered & copies mailed
" 7	63	Deft's Notice of Appeal, filed. (copies to: USA, USCA, Judge Green) (USCA #83-1882)
" 7	64	Copy of Clerk's Notice to USCA
" 16	65	Copy of Appellant's Transcript Purchase Order, filed.
1984		
Jan. 18	66	Copy of order of USCA granting an extension of 23 business days for filing of transcript, filed.
Feb. 15	67	Transcript of 10-24-83, filed.
" 15	68	Transcript of 10-25-83, filed.
" 15	69	Transcript of 10-28-83, filed.
" 15	70	Transcript of 10-31-83, filed.
" 15	71	Transcript of 1-1-83, filed.
" 17	72	Transcript of 10-26-83, filed.
" 21	73	Transcript of 11-2-83, filed. CG
" 22	—	RECORD COMPLETE FOR PURPOSES OF APPEAL
" 27	74	Transcript of 11-30-83, filed.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-1882

JOSEPH INADI, APPELLANT

v.

UNITED STATES OF AMERICA

RELEVANT DOCKET ENTRIES

DATE	FILINGS—PROCEEDINGS
1984	
May 7	Mot by applee for leave to file an appendix, w/serv, filed.
May 15	Order (Clerk) granting above mot, w/filing as of the date of this order, filed.
June 28	Ltr dtd 6/28/84 from Jeanne K. Damirgian, Esq. cnsel for applee, w/encl., copy of page 20a of applee's brief, recd. at the direction of the Crt.
June 25	Clk's ltr to cnsel for applee, written at the direc- of the Crt, advising there appears to be a gap between pages 20 and 21 of the govt' brief in this case and requesting applee to supply 10 copies of the missing material promptly.
July 17	Mot by applee to file second supplemental appendix, w/serv, filed.
Nov. 26	Motion by appee for extension of time within which to file the pet. for rehg. to and including 12/27/84 w/serv. filed. (sa)

DATE	FILINGS—PROCEEDINGS
1985	
Nov. 27	Order Amending Opinion (Adams, *Higginbotham* & Van Dusen, CJS), filed. (ch)
Dec. 4	Order (Higginbotham, C.J.) granting mot. by apee for ext. of time to file pet. for rehg. to and including 12-27-84, filed. (ml)
1985	
Jan. 9	Order (Higginbotham, C.J.) directing that attorneys for aplt. are to file an answer to the pet. for rehg. w/in 15 days, filed. (ml)
Jan. 24	Defendant's Reply to Government's Petition for rehg. with suggestion for rehg. in banc, w/serv., filed. (ml)
Jan. 29	Letter dated Jan. 28, 1985, from Walter S. Batty, Jr., Esq., cnsl for aplt., which has been rec'd for the info of the Court. (ml)
Feb. 8	Order (Aldisert, Ch.J., Seitz, Adams, Gibbons, Hunter, Weis, Garth, *Higginbotham*, Sloviter, Becker & Van Dusen, C.Js.) denying the petition for rehearing. Judge Hunter, Judge Garth, Judge Sloviter and Judge Becker would grant the petition for rehearing, filed. (ml)
Feb. 8	Order (Adams, *Higginbotham* & Van Dusen, C.Js.) amending the opinion, filed. (ml)
Feb. 15	Motion of government to stay mandate, w/serv., filed. (ml)
Feb. 25	Order (Higginbotham, C.J.) granting mot. to stay to and including April 9, 1985, filed. (ml)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Criminal No. 83-00108

Date Filed: ————

UNITED STATES OF AMERICA

v.

JOSEPH INADI

VIOLATIONS:

21 U.S.C. § 846 (Conspiracy to manufacture and distribute methamphetamine—1 Count) 21 U.S.C. § 843(b) (Using telephone to facilitate a drug felony —2 Counts) 18 U.S.C. § 1952 and 2(a) (Causing interstate travel to facilitate a drug transaction—1 Count) 21 U.S.C. § 841 (Distribution of methamphetamine—1 Count)

INDICTMENT

COUNT ONE

THE GRAND JURY CHARGES:

From in or about August of 1979 to in or about June of 1980, at Philadelphia in the Eastern District of Pennsylvania and elsewhere,

JOSEPH INADI

defendant herein, knowingly and intentionally did unlawfully combine, conspire, confederate and agree with John Lazaro, Jr., Michael McKeon, William Levan and other persons known and unknown to this Grand Jury,

to manufacture and distribute methamphetamine, a Schedule II non-narcotic controlled substance, in violation of Title 21, United States Code, Section 841(a)(1).

It was a part of the plan and purpose of the conspiracy that Joseph Inadi would provide John Lazaro, Jr., with methamphetamine in order that John Lazaro might distribute it.

It was a further part of the plan and purpose of the conspiracy that William Levan would and did provide apparatus needed to manufacture the methamphetamine.

It was a further part of the plan and purpose of the conspiracy that Joseph Inadi would provide chemicals needed in the manufacture process and would receive, for distribution, the majority of the manufactured methamphetamine.

It was a further part of the plan and purpose of the conspiracy that Michael McKeon would and did assist William Levan in preparing the methaphetamine and in delivering unsolidified methamphetamine to Cape May County, New Jersey.

In violation of Title 21, United States Code, Section 846.

COUNT TWO

THE GRAND JURY FURTHER CHARGES:

On or about May 23, 1980, at Philadelphia in the Eastern District of Pennsylvania, and elsewhere,

JOSEPH INADI

defendant herein, did knowingly and intentionally use a communication facility, that is, a telephone, in facilitating the distribution of a controlled substance, in violation of Title 21, United States Code, Section 841(a)(1), in that JOSEPH INADI used the telephone to discuss the distribution of methamphetamine with John Lazaro, Jr.

In violation of Title 21, United States Code, Section 843(b).

COUNT THREE

THE GRAND JURY FURTHER CHARGES:

On or about May 25, 1980, at Philadelphia in the Eastern District of Pennsylvania, and elsewhere,

JOSEPH INADI

defendant herein, did knowingly and intentionally use a communication facility, that is, a telephone, in facilitating the distribution of a controlled substance, in violation of Title 21, United States Code, Section 841(a)(1), in that JOSEPH INADI used the telephone to discuss the distribution of methamphetamine with John Lazaro, Jr.

In violation of Title 21, United States Code, Section 843(b).

COUNT FOUR

THE GRAND JURY FURTHER CHARGES:

On or about May 25, 1980, at Philadelphia in the Eastern District of Pennsylvania

JOSEPH INADI

defendant herein, did induce and cause John Lazaro, Jr. to travel in interstate commerce with intent to carry on an unlawful activity, that is, the distribution of a controlled substance.

In violation of Title 18, United States Code, Section 1952(a)(3) and Title 18, United States Code, Section 2(b).

COUNT FIVE

THE GRAND JURY FURTHER CHARGES:

On or about May 25, 1980, at Philadelphia in the Eastern District of Pennsylvania,

JOSEPH INADI

defendant herein, did knowingly and intentionally distribute approximately 14 grams of methamphetamine, a Schedule II non-narcotic controlled substance.

In violation of Title 21, United States Code, Section 841(a)(1).

A TRUE BILL:

_____

Foreman

_____

PETER F. VAIRA
United States Attorney

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

* * * * *

[104] Q. During the course of your agreement with Mr. Inadi was it ever necessary for you to discuss business with him, that is illicit business, by telephone?

A. Yes.

MS. MAGUIGAN: I object. She is leading, Your Honor. I ask that you instruct her not to lead.

MRS. DAMIRGIAN: I think it calls for a yes or no answer, I am not sure.

THE COURT: It does suggest what the answer will be, but given the witness' prior testimony it's hardly leading and I will overrule your objection.

THE WITNESS: Yes.

_____

BY MRS. DAMIRGIAN:

Q. What understanding, if any, did you have with Mr. Inadi concerning discussions of methamphetamine over the telephone?

A. Well, we wouldn't allude to it as methamphetamine. We would either call it suits of clothes, chain saws or chain saw oil.

Q. And specifically what is a suit of clothes when you are talking to Mr. Inadi in this context?

A. A pound of finished product, methamphetamine.

Q. Did you ever employ or hear him employ the term chain?

[105] A. Yes.

Q. Did that term have any particular significance?

A. Same thing.

Q. What about the term saws?

A. Same.

THE COURT: Pardon me one moment. When you say same, what do you mean by that?

THE WITNESS: Well, we called a pound or a pound of finished methamphetamine either a suit of clothes, a chain or a chain saw.

THE COURT: All right.

THE WITNESS: If we were talking about the P2P or the phenyl two propenol which is a catalyst, we talked about chain saw oil and I knew we were talking about oil.

BY MRS. DAMIRGIAN:

Q. Did you ever have a conversation with Joseph Inadi concerning Marianne and John Lazaro?

A. Yes.

Q. And when did that conversation take place?

A. I believe the later part of May, 1980.

Q. What caused the conversation concerning the Lazaros?

A. Joe said he had a problem; he had delivered a couple of ounces of meth to John and the police had stopped him or the agents had stopped him on the Boulevard somewhere.

[285] THE COURT: Are you talking about the identification of the voices or co-conspirators?

MS. MAGUIGAN: And in addition there are two issues there. One, they are in the position with this witness and I object to having this witness be the person to identify Lavan as the declarant. Then they have not met their burden showing he is—

THE COURT: I can voir dire this witness right now out of the hearing of the jury for his basis for identifying Lavan's voice. That is your problem, right?

MS. MAGUIGAN: There are two problems.

THE COURT: That's your initial problem?

MS. MAGUIGAN: That's one problem.

THE COURT: The other is whether they are co-conspirators and I have already ruled on that before we started trial, that I was not going to conduct a preliminary hearing on the matter, that I would hear it and that I would make findings after I heard the evidence and heard whether or not they go to the jury.

MS. MAGUIGAN: That's the rule, okay. Finally, sir, there was a confrontation clause objection that the burden the Government has in order to bring in these tapes and overcome their confrontation clause problems is to show, and following the discussion now in Ammar which relates back to Ohio versus Roberts, they must show the unavailability of [286] the declarant and two indicia of reliability in the use of the tapes and that's the separate indicia of 801(d)(2).

In Ammar and Ohio versus Roberts the court requires they make a showing of the unavailability of the declarant and the four indicia of reliability set forth in Ammar.

MRS. DAMIRGIAN: I don't have Ammar.

THE COURT: Are you going to use this witness to identify the voice of—

MRS. DAMIRGIAN: William Lavan's?

THE COURT: William Lavan.

MRS. DAMIRGIAN: If the Court is satisfied, otherwise I will call Agent Elwell so we don't have a problem with the voice identification.

THE COURT: Well, I assume you are going to ask this witness to tell us whose voice this is that said thus and so?

MRS. DAMIRGIAN: Yes, sir.

THE COURT: I don't know whether the witness is able to do that as to Lavan. I thought that he was, but maybe there is a question about it and if it's a question about it I would like to know if your offer of proof is that he has knowledge and a basis for making that identification, some conversations with Lavan which would permit him to make the identification. * * *

* * * * *

[292] THE COURT: I don't know what the situation is. I don't know what the situation is as to that witness and maybe Mrs. Damirgian can tell me.

MRS. DAMIRGIAN: Your Honor, it's John Lazaro's position that—well, his first position, his position at this point is that if he is called to testify that he will refuse to testify notwithstanding he has been made well aware that he will probably or could likely be given six months for contempt of Court and be held in violation of his parole by the State of New Jersey. He has advised me of that personally in the company of his wife.

THE COURT: Well, we may indeed require him to come. It seems to me that in order to resolve this question that you are better off putting on your evidence of unavailability than having to argue it later on.

MRS. DAMIRGIAN: Very well. We will bring Lavan and Lazaro.

THE COURT: Than have to argue it later on as to whether it is a requirement in this context.

MRS. DAMIRGIAN: Yes.

THE COURT: And certainly there are cases which perhaps suggest it may not be in the confrontation sense a requirement.

MRS. DAMIRGIAN: Is it my understanding that [293] before we can play the tapes though in which Inadi alone is speaking, may I suggest this to the Court then. Obviously—

THE COURT: I am going to permit you to play all the tapes based on your representations.

MRS. DAMIRGIAN: And then bring them in?

THE COURT: And your tying in that evidence at a later time, unless, as I have said, if Ms. Maguigan does not want us to bring these witnesses in. Obviously there are a lot of ways you can do it. You can bring the witness in, swear the witness and determine his unavailability. Maybe she would prefer that you not do it or that you do it. I don't care.

MS. MAGUIGAN: Your Honor, I am perfectly willing to talk with my client about it. Obviously it is a weighty matter; I am asking for some advice.

THE COURT: They may come in and decide they want to testify, I don't know.

MS. MAGUIGAN: Sure. I would like to know so I can have my conversation with my client. The Court is satisfied were Lazaro to appear and decline to testify that he was unavailable.

THE COURT: What I am saying is if they come in and claim their rights not to testify I would consider that unavailable. That puts on record at least one prong of why I would consider it. * * *

* * * * *

[408] THE COURT: Thank you, sir.

Do you have anything else to bring before the Court?

MRS. DAMIRGIAN: No, sir. We had asked John Lazaro to be here also, although we don't believe we have the same problem with him and apparently he had car problems so I would assume that the Court would just want to go ahead with the jury trial.

THE COURT: I will go ahead with the jury. If he arrives and you wish to call him I will hear him out of the presence of the jury.

Do you have any reason for wanting Mr. Lavan to be heard by the jury?

MS. MAGUIGAN: No, sir.

THE COURT: Fine, you are excused.

(Witness was excused).

MS. MAGUIGAN: Your Honor, I have one matter. Yesterday when I asked the Court for enforcement of the subpoenas which were served the Court directed me to prepare a written motion and order. I have done so. The original will be filed with the Court. I am serving a copy on the Government. If I may approach I have a copy for the Court.

THE COURT: Okay, fine. Does the Government wish to respond to this motion?

* * * * *

[443] Q. How many years have you been with DEA, Mr. Hershowitz?

A. Fifteen years.

Q. And during the course of that time have you been involved in investigations concerning methamphetamine?

A. Many.

Q. Have you actually been involved in investigations which included methamphetamine laboratories?

A. Yes, I have.

Q. And during that time have you been involved in court order wiretaps involving methamphetamine distribution or laboratories?

A. Yes.

Q. Have you also been involved in essentially monitored conversations which dealt with the manufacture or distribution of methamphetamine?

A. Yes, I have.

Q. Is it common practice for persons dealing in methamphetamine to refer to it by words other than methamphetamine?

MS. MAGUIGAN: Judge, before he answers, if I may, while I don't object to her offering questions to qualify the agent as someone with experience, I do object to her using the same form of leading questions at this juncture.

[444] THE COURT: I will overrule your objection because it doesn't suggest the answer to the present question, but if you are going to get into anything substantive do not lead, please.

THE WITNESS: Would you repeat that please?

MRS. DAMIRGIAN: The question was was it a common practice to refer to it by words other than methamphetamine?

THE WITNESS: As a matter of fact, it's rare or rarely would the actual word methamphetamine be used in those conversations.

BY MRS. DAMIRGIAN:

Q. What types of words have you heard used during the course of methamphetamine investigations?

A. Numerous, crank, speed, rabbit, referred to as clothes, suits, shirts; and there was an occasion, a wiretap, in which the term chain was in fact utilized previously; that was back in 1975 I believe, chain.

Q. But that was not related to this investigation?

A. Not at all.

Q. When you first heard the tape from Cape May County was there any question in your mind as to what the references were?

A. No question in my mind.

* * * * *

[574] THE COURT: In regard to the various tapes and transcripts at this time there is clearly at least a preponderance of the evidence to support a finding that the conspiracy alleged was actually formed and that Mr. Inadi was a member of that conspiracy.

The tapes and transcripts which the jury have heard today, there is a preponderance of the evidence to establish that the statements by co-conspirators were made in furtherance of the conspiracy and during the course of the conspiracy. As to Mr. Levan he has taken the witness stand and from his testimony I would find that he is actually unavailable to the Government or to defendant. As to Mrs. Lazaro and Mr. McKeon, of course they have testified in this matter, and as to Mr. Inadi's conversations they would be admissible as to Mr. Inadi's statements as statements by a party to the litigation and as to Mr. Lazaro as to statements by a co-conspirator.

Under the circumstances I do not believe that [575] there is any violation of any right of Mr. Inadi to confront the witnesses and therefore at this time I will admit all the tapes and transcripts which have been played to date and thus the Government has its exhibits 1 through 14 admitted.

(Government Exhibits 1 through 14 were received in evidence.)

THE COURT: The Government rests?
MRS. DAMIRGIAN: Yes, sir.
THE COURT: Do you have any motions?
MRS. DAMIRGIAN: No, sir.
THE COURT: All right, do you wish to produce evidence?
MS. MAGUIGAN: May I have a moment please, sir?
Your Honor, I understand that the court has ruled and I request leave to make certain specific objections with regard to the ruling on co-conspirators.
THE COURT: Very well.

* * * * *

SUPREME COURT OF THE UNITED STATES

No. 84-1580

UNITED STATES, PETITIONER

v.

JOSEPH INADI

Filed May 28, 1985

ORDER ALLOWING CERTIORARI

The petition herein for a writ of certiorari to the *United States Court of Appeals for the Third Circuit* is granted.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1985 480201 11048

(5)

No. 84-1580

In the Supreme Court of the United States

OCTOBER TERM, 1985

UNITED STATES OF AMERICA, PETITIONER

v.

JOSEPH INADI

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether the Confrontation Clause bars the prosecution from introducing statements falling within the co-conspirator exception to the hearsay rule (Fed. R. Evid. 801(d)(2)(E)) unless it establishes that the declarant is unavailable to testify at trial.

2. Whether, if the court of appeals was correct that proof of unavailability is required, it should have ordered a remand hearing to determine the question of unavailability rather than ordering a new trial.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Constitution, statutes and rules:

Miscellaneous: Page

Miscellaneous—Continued: Page

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 748 F.2d 812. The order amending that opinion (Pet. App. 17a-19a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on November 13, 1984. The order denying rehearing was entered on February 8, 1985 (Pet. App. 20a). The petition for a writ of certiorari was filed on April 4, 1985, and was granted on May 28, 1985. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION AND RULE INVOLVED

The Sixth Amendment provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him * * *.

Rule 301(d) of the Federal Rules of Evidence provides in pertinent part:

> A statement is not hearsay if—
>
> * * * * *
>
> (2) * * * The statement is offered against a party and is * * * (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Pennsylvania, respondent was convicted on six counts arising from a scheme to manufacture and distribute methamphetamine. He was sentenced to three years' imprisonment to be followed by a seven-year special parole term. The court of appeals reversed (Pet. App. 1a-16a).

1. The evidence at trial showed that in September 1979 unindicted co-conspirator Michael McKeon approached respondent seeking a distribution "outlet" for methamphetamine. The two men agreed that respondent would supply cash and chemicals for the venture and would also be responsible for distribution, while McKeon and co-conspirator William Levan would actually manufacture the drug (Tr. 77-83, 93).

McKeon and Levan made three attempts to manufacture methamphetamine in Philadelphia between December 1979 and April 1980. On the first occasion, McKeon made three pounds of methamphetamine using P-2-P, a precursor chemical, supplied by respondent. This methamphetamine was delivered to respondent. McKeon, Levan, and respondent shared a profit of $19,500 on this transaction. The second "cook" failed to produce methamphetamine because a necessary ingredient supplied by respondent turned out to be a substance other than P-2-P. A third "cook" succeeded in producing three and one-half pounds of methamphetamine, which Levan delivered to respondent (Tr. 83-93).

Thereafter, McKeon went to Cape May, New Jersey, with the liquid residue from the third "cook." He met respondent, Levan, co-conspirator John Lazaro, as well as two others not named as co-conspirators, at an empty house that McKeon believed had been rented through Lazaro. There they attempted to extract additional methamphetamine from the liquid residue. This "drying" resulted in less than an ounce of low quality product, which McKeon promptly sold for $200 (Tr. 95).

In the early morning hours of May 23, 1980, two local police officers, acting pursuant to a search warrant, surreptitiously entered the Cape May house and removed a tray covered with drying methamphetamine. With the permission of the issuing magistrate, the officers delayed returning an inventory, leaving the participants to speculate about what had happened to the missing tray (Tr. 257-260, 275, 299-300).

On May 25, 1980, two DEA agents observed a meeting between respondent and Lazaro alongside Lazaro's car in the parking lot of a restaurant in Philadelphia. At one point, one of the agents observed respondent lean into the car. After Lazaro drove off, the agents overtook and stopped his car. They searched the car, as well as Lazaro and his wife Marianne, who was a passenger at the time. Finding nothing, the agents allowed the Lazaros to leave. Marianne Lazaro later recounted that during the search she threw away a clear plastic bag containing white powder that her husband had handed to her after the meeting with respondent. Eight hours after the search, one of the agents returned to the scene of the stop and found a clear plastic bag containing a small quantity of methamphetmine (Tr. 361, 432-439, 472-485, 555-556).[1]

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[1] Marianne Lazaro, who was named as an unindicted co-conspirator and who testified for the government under a grant of use immunity, denied that the bag found by the agent was the same one that her husband had given her (Tr. 505-506).

From May 23 to May 27, 1980, state officers lawfully intercepted five telephone conversations between various participants in the conspiracy. These taped conversations were played for the jury at trial. In one conversation, Lazaro asked respondents, in code, for a quantity of methamphetamine and reported on the residue missing from the Cape May house, suggesting that "Mike" probably took it. In another conversation, Lazaro and respondent arranged the meeting in the parking lot. In a third conversation, Lazaro reported to respondent that he kicked a "piece" under his car during the May 25 stop by the DEA agents, and he wondered how the agents were tipped off. (GX 8-10).

In a fourth conversation, between McKeon and Marianne Lazaro, the latter described the May 25 incident and suggested that respondent might have set them up. McKeon assured her that respondent was not an informant. In the final intercepted conversation, Levan and John Lazaro discussed the missing residue and speculated about who had set Lazaro up for the May 25 stop. (GX 13-14).

2. At trial, respondent sought to exclude the recorded statements of John Lazaro and the other co-conspirators on the ground that the statements did not satisfy the requirements of Fed. R. Evid. 801(d)(2)(E), which regulates admission of co-conspirator declarations. The court deferred ruling on this issue until after hearing the evidence (see J.A. 16); it then admitted the statements, finding that a preponderance of the evidence established that the statements were made by conspirators in furtherance of and during the course of the conspiracy (J.A. 21).

Respondent also objected to the admission of the statements on Confrontation Clause grounds, contending that the government had the burden of showing that the declarants were unavailable (J.A. 17). In response, the prosecutor informed the court that Lazaro had advised her personally that he would refuse to testify even if held in contempt. Nevertheless, at the judge's suggestion,

the prosecutor promised to bring Lazaro to court. The judge also asked defense counsel whether she wanted the prosecution to call Lazaro, since this might result in his testifying, and defense counsel stated that she would discuss this "weighty matter" with her client (J.A. 18). The government subpoenaed Lazaro (see Pet. App. 15a), but he failed to appear, advising the prosecutor that he had "car problems" (J.A. 19). The defense did not subpoena Lazaro, seek the issuance of a bench warrant, or (as far as the record indicates) make any other efforts to secure Lazaro's presence in court.

The court ultimately rejected all of respondent's Confrontation Clause objections. It noted (J.A. 21) that two of the four co-conspirator declarants (Mrs. Lazaro and McKeon) had testified and that the third (Levan) had asserted his Fifth Amendment privilege outside the presence of the jury. The court then implicitly rejected respondent's contention that the government was obligated to produce Mr. Lazaro or prove his unavailability. Lazaro's statements were admissible, the court held (J.A. 21), simply because they satisfied the co-conspirator rule.

3. On appeal, respondent reiterated his contention that the admission of John Lazaro's recorded statements violated both the co-conspirator exception to the hearsay rule and the Confrontation Clause. The court of appeals held that Lazaro's statements satisfied the requirements of the co-conspirator rule (Pet. App. 8a-11a). However, the court accepted respondent's contention that the Confrontation Clause requires the government to show the unavailability of a non-testifying co-conspirator as a precondition to admitting his out-of-court statements (*id.* at 11a-13a).

In imposing an "unavailability" requirement under the Confrontation Clause, the court relied almost exclusively (Pet. App. 12a) on this Court's dictum in *Ohio* v. *Roberts*, 448 U.S. 56, 65 (1980), that "in conformance with the Framers' preference for face-to-face accusation, the Sixth Amendment establishes a rule of necessity. In the usual case * * * the prosecution must either produce,

or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant." The court of appeals found no reason for excepting co-conspirator statements from "the clear constitutional rule laid down in *Roberts*" (Pet. App. 12a). The court added (*id.* at 13a) that "it does not seem unreasonable to require the government to demonstrate that its hardship is real before availing itself of this tremendous evidentiary advantage."

The court rejected the government's argument that Lazaro's unavailability had in fact been sufficiently established, suggesting that the government should have requested a bench warrant to secure Lazaro's presence after he failed to obey the subpoena (Pet. App. 13a-16a). The court declined to credit the government's representation that Lazaro would refuse to testify and insisted that nothing less than "an actual assertion of privilege and exemption by ruling of the court" would suffice (*id.* at 16a). Respondent's convictions were reversed, and the case was remanded for a new trial (*ibid.*).

INTRODUCTION AND SUMMARY OF ARGUMENT

I.

Under common law, hearsay evidence was generally inadmissible, but exceptions to this rule for specific categories of hearsay were always recognized. Over the years, these exceptions were forged by litigation, examined by scholars and legislators, and modified in light of ongoing experience and study. The provisions of the Federal Rules of Evidence dealing with hearsay represent a codification and refinement of the common law approach: hearsay is generally made inadmissible (Rule 802), but there are more than 30 exemptions and exceptions (Rules 801(d), 803, 804). One of these exemptions, Rule 801(d)(2)(E), codifies the common law rule (which this Court adopted more than 150 years ago) permitting the admission of statements made by a co-conspirator during and in furtherance of the conspiracy.

This ancient and highly developed scheme for regulating the admission of hearsay has been thrown into confusion in recent years as a result of claims made by criminal defendants that the introduction of hearsay admissible under long accepted common law rules nevertheless violated their Sixth Amendment right "to confront the witnesses against" them. Because the co-conspirator rule is apparently the most frequently used exception to the hearsay rule,[2] the bulk of the lower court litigation has concerned co-conspirator declarations, and the courts of appeals are in sharp conflict regarding the effect of the Confrontation Clause on this rule. While some circuits have held that statements falling within the co-conspirator rule automatically satisfy the Confrontation Clause,[3] other circuits, including the Third Circuit, whose decision is now before the Court, have held that co-conspirator statements are barred by the Confrontation Clause unless the government (a) produces the declarant or establishes that he is unavailable and (b) establishes that the particular statements at issue are reliable.[4] In addition, several courts of appeals

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[2] See 4 D. Louisell & C. Mueller, *Federal Evidence* § 427, at 331 (1980).

[3] *E.g.*, *Boone* v. *Marshall*, 760 F.2d 117 (6th Cir. 1985); *United States* v. *Molt*, 758 F.2d 1198 (7th Cir. 1985); *Ottomano* v. *United States*, 468 F.2d 269, 273 (1st Cir. 1972), cert. denied, 409 U.S. 1128 (1973). See *United States* v. *Wolfe*, No. 84-9009 (11th Cir. July 29, 1985), slip op. 5544 (co-conspirator statements presumptively reliable; issue of declarants' availability not presented).

[4] In addition to the instant case, see *United States* v. *Caputo*, 758 F.2d 944 (3d Cir. 1985) (availability); *United States* v. *Ammar*, 714 F.2d 238, 254-257 (3d Cir. 1983), cert. denied, 464 U.S. 936 (1983) (reliability); *United States* v. *DeLuna*, 763 F.2d 897 (8th Cir. 1985); *United States* v. *Ordonez*, 737 F.2d 793, 802-804 (9th Cir. 1984); *United States* v. *Tille*, 729 F.2d 615, 620-621 (9th Cir. 1984), cert. denied, Nos. 83-6907, 83-6978 (Oct. 1, 1984).

The Second and Tenth Circuits appear to take an intermediate position, *i.e.*, that whether or not the co-conspirator declarant is available, the Confrontation Clause demands that the trier of fact have an adequate basis for judging reliability. See *United States*

have held that the Confrontation Clause imposes similar requirements as prerequisites for admission of evidence falling within other traditional hearsay exceptions.[5]

We find it hard to understand, nearly two hundred years after the adoption of the Sixth Amendment, what sudden epiphany could provide a supportable basis for the conclusion that the Constitution has been routinely violated under settled past practice. In our view, this reevaluation of traditional hearsay exceptions under the Confrontation Clause is unwarranted by the purposes of the Clause, which was primarily intended to prohibit trial by affidavit or deposition and analogous practices and was not meant to furnish a standard for close regulation of all traditional hearsay exceptions.

1. The hearsay rule, which has never been without exceptions, developed during the same general period as the right to confrontation, but they were doctrinally discrete. The hearsay rule, which applies both to criminal and civil trials, provided detailed regulation of the admission of out-of-court statements, while the right to confrontation developed in specific response to the hated 17th century practice of trying criminal defendants based on affidavits and depositions obtained ex parte by ex-

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v. *Perez*, 702 F.2d 33 (2d Cir. 1983) (adding that co-conspirator statements are usually reliable because they are against penal interest), cert. denied, 462 U.S. 1108 (1983); *United States* v. *Wright*, 588 F.2d 31, 37-38 (2d Cir.), cert. denied, 440 U.S. 917 (1979); *United States* v. *Alfonso*, 738 F.2d 369 (10th Cir. 1984); *United States* v. *Roberts*, 583 F.2d 1173, 1175-1176 (10th Cir. 1978), cert. denied, 439 U.S. 1080 (1979).

Fourth and Fifth Circuit precedent on this point are unclear. Compare *United States* v. *Lisotto*, 722 F.2d 85, 88 (4th Cir. 1983), cert. denied, No. 83-1417 (Mar. 26, 1984), with *United States* v. *Lurz*, 666 F.2d 69, 80-81 (4th Cir. 1981), cert. denied, 458 U.S. 1005 (1982); see *United States* v. *Peacock*, 654 F.2d 339, 349 (5th Cir. 1981), cert. denied, 464 U.S. 965 (1983).

[5] See *Haggins* v. *Warden*, 715 F.2d 1050 (6th Cir. 1983) (excited utterance); *United States* v. *Washington*, 688 F.2d 953, 959 (5th Cir. 1982) (business records); *Lenzar* v. *Wyrick*, 665 F.2d 804, 810-811 (8th Cir. 1981) (state-of-mind exception).

amining magistrates. Eighteenth century authorities perceived no contradiction between the recognized hearsay exceptions and the confrontation right.

In this country, the Confrontation Clause was inserted in the Bill of Rights with scarcely any discussion or debate. Had there been any thought that this provision departed from the settled understanding of the right of confrontation and affected the established exceptions to the hearsay rule, there would have surely been some explanation or controversy. This interpretation of the Confrontation Clause is strongly supported by early 19th century case law.

2. The present confusion regarding the meaning of the Confrontation Clause is traceable chiefly to a single hearsay exception, that for prior recorded testimony. This type of traditionally admissible hearsay may be aptly analogized to an affidavit or deposition, because like them it is generally nothing more than an inferior substitute for live testimony. Accordingly, this Court has tested former testimony against Confrontation Clause standards; and because former testimony is ordinarily only a next-best substitute for live testimony, former testimony has been held to be generally inadmissible unless live testimony cannot be obtained.

Unlike former testimony, evidence falling within other traditional hearsay exceptions, including the co-conspirator rule, has probative value very different from subsequent live testimony, and therefore under the law of hearsay the availability of the declarant to give live testimony has not been regarded as having any bearing on the admissibility of statements falling within most traditional exceptions. The court of appeals in this case and some other lower courts have in recent years lost sight of this critical distinction and have erred in mechanically subjecting the co-conspirator rule and other time-honored hearsay exceptions to additional obstacles to use derived from this Court's cases involving only the problems specifically associated with former testimony.

This Court's decisions do not support such an approach. On the contrary, this Court's Confrontation Clause cases involving the admission of hearsay appear to take a very different, three-part approach. First, in accordance with the historical origin of the Confrontation Clause, those forms of potentially admissible hearsay that resemble affidavits or depositions have been closely regulated—and it is in this specific context that availability has been considered important. Second, the Court has regarded other firmly rooted hearsay exceptions as presumptively constitutional. Third, the Court has held out the possibility that novel hearsay exceptions may be subjected to more exacting scrutiny.

3. Close reexamination of all of the traditional hearsay exceptions under the Confrontation Clause would be a burdensome and pointlessly duplicative process, especially since those exceptions have been forged with full consideration of the very same fundamental concern that underlies the Confrontation Clause: what kind of evidence is too likely to mislead the finder of fact to permit its use at trial. In the case of the co-conspirator rule, moreover, the Court would be reevaluating a doctrine that may aptly be characterized as the Court's own creation. Constitutionalizing the hearsay rules would also stunt beneficial evolution and experimentation.

4. The specific holding of the court of appeals in this case—that the prosecution may not introduce a co-conspirator statement unless the declarant is produced or the prosecution carries the burden of showing the declarant to be unavailable—would substantially impair the prosecution of crime without any appreciable benefits. Indeed, it does not seem an exaggeration to state that the Court has seldom had before it a proposed constitutional rule that would add more to the expense and complexity of criminal trials while contributing less to the reliability of their outcomes than the rule adopted by the court of appeals in this case.

The use of co-conspirator declarations as evidence at criminal trials is one of the great commonplaces of the American legal landscape, surely occurring tens of thou-

sands of times each year in state and federal courtrooms throughout the nation. Up until the last couple of years, the rules surrounding the admission or exclusion of such evidence never conditioned the admissibility of co-conspirator declarations on any showing respecting the availability or unavailability of the extra-judicial declarant. Under the court of appeals' rule, however, each extra-judicial declarant must now be produced in court (or his absence satisfactorily explained) as a condition to admission of his or her statement in furtherance of the conspiracy, whether or not any party actually wishes to call the declarant as a witness. Many of these individuals will not be locatable at the time of trial, in which case a hearing (potentially lengthy and complex) will have to be held into whether the prosecution made all reasonable efforts to locate the declarant or was somehow at fault in losing track of his or her whereabouts. Others may be serving prison sentences and will be producible only at considerable expense. Most of the declarants, if they are not already to be witnesses for one side or the other, will refuse to testify, and hearings will then be required to evaluate their claims of privilege and/or to determine whether they should be held in contempt before being found unavailable. And, of course, rulings of unavailability will provide fertile new ground for appellate review.

Moreover, all of this time, effort, and expense that will go into producing or litigating the unavailability of co-conspirator/declarants will have little effect on the actual course of the trial. It must be done even though the defendant has not independently elected to call the declarant as a witness and may have no interest whatever in having him actually testify, as likely was the case here (see J.A. 18), and even though the admissibility of statements made in furtherance of the conspiracy is the same whether the declarant in fact testifies or not.

II.

Finally, even if unavailability must be shown, the court of appeals should have remanded this case for a

hearing on the co-conspirator/declarant's availability rather than reflexively ordering a new trial. If the declarant was indeed unavailable at the time of trial, reversal was an inappropriate remedy, and a retrial would be pointless.

ARGUMENT

I. THE ADMISSION OF STATEMENTS IN CONFORMITY WITH THE TRADITIONAL CO-CONSPIRATOR RULE DOES NOT VIOLATE THE CONFRONTATION CLAUSE

A. The Confrontation Clause Was Intended To Prohibit Trial By Affidavit And Comparable Practices, Not To Proscribe Or Generally Regulate The Admission Of Hearsay

In recent years, there has been much confusion regarding the relationship between the right of confrontation protected by the Sixth Amendment and the rules regulating the admission or exclusion of hearsay. Historically, the right of confrontation and the hearsay rule were related but doctrinally discrete reforms of pre-18th century trial procedures. There was no mixing or confusion of these two doctrines in the minds of jurists, scholars, and statesmen at the time of the adoption of the Bill of Rights, and no intent to regulate hearsay generally by means of the Confrontation Clause.

1. The history of the hearsay rule has been recounted by legal scholars and need not be detailed here. See, *e.g.*, 5 *Wigmore on Evidence* § 1364 (Chadbourn rev. ed. 1974) [hereinafter cited as *Wigmore*]; 9 W. Holdsworth, *History of the English Law* 177-187, 214-219, 222-236 (1926); 1 J. Stephen, *A History of the Criminal Law of England* 216-233, 324-427 (1883); Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 Harv. L. Rev. 177, 179-183 (1948); Morgan, *The Hearsay Rule*, 12 Wash. L. Rev. 1 (1937). Before the 16th century, it was accepted practice for jurors to obtain information by consulting persons not called into court. 5 *Wigmore* § 1364, at 13-15. During the 1500s, evidence

obtained in this manner began to be overshadowed by evidence given by witnesses appearing in court (*id.* at 15), but hearsay statements were "constantly received" (*id.* at 17). Doubts about the value of such evidence arose during the 16th century and increased during the 17th, and by the 1680s there was "a fairly constant enforcement [of the hearsay rule] both in civil and criminal cases." *Id.* at 18. By the 18th century, the general rule was firmly established. *Id.* at 19.

This rule, however, was never devoid of exceptions. See 5 *Wigmore* § 1397, at 158; Morgan, 62 Harv. L. Rev. at 179. Scholars have found that the following exceptions had taken shape by the late 18th century: dying declarations,[6] regularly kept records,[7] declarations against interest,[8] past recollection recorded,[9] evidence of pedigree and family history,[10] and various types of reputation evidence.[11] In addition, as we will discuss (see pages 19-21, *infra*), the co-conspirator rule emerged during this same period.

2. The right of confrontation developed during the 17th century in response to the practice of convicting criminal defendants based upon affidavits. Towards the end of the 16th century, "[t]hough the crown was beginning to call witnesses, * * * the witnesses were not confronted with the prisoner." 9 W. Holdsworth, *supra*,

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[6] 5 *Wigmore* § 1430, at 275 ("This exception, as such, dates back as far as the first half of the 1700s."); *McCormick on Evidence* 680 (2d ed. 1972) [hereinafter cited as *McCormick*] ("as soon as we find a hearsay rule we also find a recognized exception for dying declarations").

[7] 5 *Wigmore* § 1518, at 426-428; *McCormick* 717-718; 3 W. Blackstone, *Commentaries on the Law of England* 368 (1768).

[8] 5 *Wigmore* § 1476, at 350.

[9] 3 *Wigmore* § 735, at 78-84; *McCormick*, 712.

[10] 5 *Wigmore* § 1480, at 363; *McCormick*, 745.

[11] 5 *Wigmore* § 1580, at 544; *McCormick* 748-759; 3 W. Blackstone, *supra*, at 368.

at 224; see also *Gannett Co.* v. *DePasquale*, 443 U.S. 368, 421 (1979) (Blackmun, J.).

Particularly relevant for present purposes was the function of the examining magistrate. Statutes enacted in 1554 and 1555 (1 & 2 Phil. & M. ch. 13; 2 & 3 Phil. & M. ch. 10) directed magistrates to interview and take the depositions of all witnesses to felonies;[12] this examination "was intended only for the information of the court. The prisoner had no right to be, and probably never was present. * * * [T]he depositions were to be returned to the court, but there is evidence to show that the prisoner was not allowed even to see them." 1 J. Stephen, *supra*, at 221.

These depositions were often the principal "evidence" at trial. As Stephen relates (*id.* at 325-326):

> The proof was usually given by reading depositions, confessions of accomplices, letters, and the like; and this occasioned frequent demands by the prisoner to have his "accusers," *i.e.*, the witnesses against him, brought before him face to face, though in many cases the prisoners appear to have been satisfied with the depositions.

The trial of Sir Walter Raleigh for treason in 1603 is illustrative of this procedure. A crucial element of the evidence against Raleigh consisted of the deposition of one Cobham and a letter that Cobham wrote thereafter, both of which indirectly implicated Raleigh in a plot to seize the throne. Raleigh had a written retraction from Cobham, and believed that Cobham would now testify in his favor. There was a lengthy dispute over Raleigh's right to have Cobham called as a witness, but the court refused the request, reasoning that "so many horse-stealers may escape, if they may not be condemned without witnesses,"[13] and Raleigh was convicted. 1 J.

[12] Misdemeanors were under the jurisdiction of the Star Chamber, which followed essentially similar procedures. 1 Stephen, *supra*, at 338.

[13] Quoted in Pollitt, *The Right of Confrontation: Its History and Modern Dress*, 8 J. Pub. L. 381, 389 (1959).

Stephen, *supra*, at 333-336; 9 W. Holdsworth, *supra*, at 216-217, 226-228.

Another celebrated 17th century trial, that of the Quaker preacher John Lilburne, led to recognition of the right of confrontation. See Pollitt, *The Right of Confrontation: Its History and Modern Dress*, 8 J. Pub. L. 381, 389-390 (1959). Charged in 1637 with illegally importing books attacking the Anglican bishops, Lilburne refused to answer the prosecution's questions, insisting that "my accusers ought to be brought face to face, to justify what they accuse me of."[14] Found in contempt by the Star Chamber, Lilburne was freed in 1640 by an act of Parliament condemning the action of the Star Chamber.[15] "Thereafter," according to a commentator, "there was no dispute in England about the right to confrontation." Pollitt, *supra*, 8 J. Pub. L. at 390.

3. The 18th century understanding of the relation between the right of confrontation and the hearsay rule is illustrated by the writings of Hale and Blackstone. Two points of importance for the present case are highlighted by their analyses: first, these two doctrines were not tied together but were viewed as distinct; second, no contradiction was perceived between the right of confrontation and the existence of exceptions to the hearsay rule.

Discussing trial by jury, Hale made express reference to the hearsay exceptions for regularly kept records and ancient deeds. He stated that evidence in jury trials was given "upon the OATH of witnesses, or other evidence by law allowed;—as Records and Ancients Deeds." M. Hale, *The History of the Common Law of England* 342 (6th ed. 1820). Several pages later, without any hint of contradiction, he wrote that "by [the] personal appearance

[14] Stephen, *Criminal Procedure From the Thirteenth to the Eighteenth Century*, in 2 *Select Essays in Anglo-American Legal History* 443, 506 (1908).

[15] Stephen, *Criminal Procedure From the Thirteenth to the Eighteenth Century* in 2 *Select Essays in Anglo-American Legal History*, *supra*, at 507. See generally, Wolfram, *John Lilburne: Democracy's Pillar of Fire*, 3 Syracuse L. Rev. 213 (1952).

and testimony of witnesses, there is opportunity of confronting the adverse witnesses; * * * and by this means great opportunities are gained, for the true and clear discovery of the truth." *Id.* at 345-346.[16]

Blackstone's discussion is similar but more detailed. After disclaming any intent "to enter into the numberless niceties and distinctions of what is, or is not, legal *evidence* to a jury" (3 W. Blackstone, *Commentaries on the Law of England* 367 (1768) (emphasis in original)), he referred to the hearsay rule and the fact that it has exceptions (*id.* at 368):

> [N]o evidence of a discourse with another will be admitted, but the man himself must be produced; yet in some cases (as in proof of any general customs, or matters of common tradition or repute) the courts admit of hearsay evidence * * *.

Five pages later, Blackstone provided a classic statement of the right of confrontation, explaining both its meaning and purpose (*id.* at 373-374) (footnotes omitted; emphasis added):

> This open examination of witnesses *viva voce*, in the presence of all mankind, is much more conducive to the clearing up of truth, than the private and secret examination taken down in writing before an officer, or his clerk in the ecclesiastical courts and all others that have borrowed their practice from civil law: where a witness may frequently depose that in private, which he will be ashamed to testify in a public and solemn tribunal. There an artful or careless scribe may make a witness speak what he never meant, by dressing up his depositions in his own forms and language; but he is here at liberty to correct and explain his meaning, if misunderstood, which he can never do after a written deposition is once taken. Besides the occasional questions of the judge, the jury, and the counsel, propounded to the

[16] See also 2 W. Hawkins, *A Treatise of the Pleas of the Crown* 429-431 (1721) (treating the admission of depositions taken pursuant to the above-noted statutes and the admission of hearsay as two separate questions).

> witnesses on a sudden, will sift out the truth much better than a formal set of interrogatories previously penned and settled: and *the confronting of adverse witnesses* is also another opportunity of obtaining a clear discovery, which can never be had upon any other method of trial. * * * In short by this method of examination, and this only, the persons who are to decide upon the evidence have an opportunity of observing the quality, age, education, understanding, behavior, and inclinations of the witness; in which points all persons must appear alike, when their depositions are reduced to writing, and read to the judge, in the absence of those who made them: and yet as much may be frequently collected from the manner in which the evidence is delivered, as from the matter of it. These are a few of the advantages attending this, the English way of giving testimony, *ore tenus.*

In short, Blackstone explained that the right to confrontation was nothing more than the right to a trial in which the prosecution's case was established by live witnesses rather than by depositions or written interrogatories.

4. In view of this understanding of the nature and extent of the right of confrontation, the events surrounding the adoption of the Sixth Amendment take on an unmistakable meaning.

Most of the state constitutions in effect at the time of federal constitutional convention of 1787 guaranteed the right to confrontation.[17] When the Constitution was considered by the state ratifying conventions and a consensus emerged that a Bill of Rights should be added, amendments proposed in several of the state conventions contained provisions guaranteeing this right.[18] Inclusion of the confrontation right in these proposals occasioned

[17] See 1 B. Schwartz, *The Bill of Rights: A Documentary History* 235 (1971) (Va.); *id.* at 265 (Pa.); *id.* at 277 (Del.); *id.* at 282 (Md.); *id.* at 287 (N.C.); *id.* at 323 (Vt.); *id.* at 341, 371 (Mass.); *id.* at 377 (N.H.).

[18] 2 B. Schwartz, *supra*, at 665 (Pa.) (unsuccessful proposal); *id.* at 841 (Va.); *id.* at 913 (N.Y.).

little discussion and no controversy, but the few remarks made about this right fully support the view that there was no intention to alter or expand the common law doctrine.

In Pennsylvania, where the first convention was held, amendments unsuccessfully proposed by Antifederalists would have guaranteed "[t]hat in all capital and criminal prosecutions, a man has a right * * * to be confronted with the accusers and witnesses." [19] The proponents explained that their aim was to preserve "the common law proceedings for the safety of the accused in criminal prosecutions." [20] Although rejected in Pennsylvania, the Antifederalist proposal became the model for states "which desired to ratify the Constitution and, at the same time, wanted a Bill of Rights." [21]

In Virginia, Patrick Henry criticized the Constitution because it failed to protect individual rights guaranteed at common law and by the Virginia Declaration of Rights of 1776 [22] (which protected the right of confrontation).[23] The Virginia Convention appointed a committee, including Henry and James Madison, to draft proposed amendments.[24] The committee's proposal, which contained a confrontation provision identical to that in the Virginia Declaration, was adopted by the Convention.[25]

After ratification of the Constitution, James Madison proposed adoption by the First Congress of 12 constitutional amendments, one of which protected the confrontation right.[26] This right was included in the Sixth Amendment and adopted without discussion.[27]

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[19] 2 B. Schwartz, *supra*, at 665.

[20] 2 B. Schwartz, *supra*, at 668.

[21] 2 B. Schwartz, *supra*, at 628.

[22] 2 B. Schwartz, *supra*, at 798-799.

[23] 1 B. Schwartz, *supra*, at 235.

[24] 2 B. Schwartz, *supra*, at 839.

[25] 2 B. Schwartz, *supra*, at 841.

[26] 1 Annals of Cong. 1785-1790 (1789).

[27] *Ibid.* See E. Dumbauld, *The Bill of Rights* 33-49, 53-54 (1957).

From this history and the 18th century understanding of the right of confrontation, three points of importance for present purposes emerge. First, the paucity of explanation or discussion about the meaning of the right to confrontation can signify only that the meaning of that right was commonly understood and that there was no thought that the Sixth Amendment departed from this settled meaning. This is reinforced by the absence of any controversy regarding the inclusion of the Confrontation Clause in the Bill of Rights. Second, as best we can determine, not a word was spoken or written—by those who sought the adoption of a bill of rights, by the First Congress, or by the state legislatures that ratified the Bill of Rights—to suggest that the confrontation right had anything to do with the general regulation of hearsay or the details of the law of evidence.

It is also telling for present purposes that the rule allowing admission of co-conspirator declarations had already emerged in England at the time of the adoption of the Sixth Amendment. In a famous trial in 1710, Daniel Dammaree and others were convicted of treason for leading a mob that pulled down four dissenting meeting houses. *Trial of Daniel Dammaree*, 15 State Tr. 522 (1710); see 1 J. Stephen, *supra*, at 270-271. The Lord Chief Justice instructed the jury that in order to convict Dammaree of treason it was necessary to show that it was his intention not simply to destroy a single meeting house, "but to pull them down all" (15 State Tr. at 607), and in this connection the prosecution's witnesses permissibly related numerous statements made by members of the mob that bore upon their intentions (*id.* at 552-562, 595-599).

In an equally well known case, Lord George Gordon was tried for treason in 1781 for leading a mob that attempted by force to procure the repeal of a law mitigating the penalties imposed on Roman Catholics. The mob broke open jails, assaulted the Bank of England, and "tried to burn down London." 2 J. Stephen, *A History of the Criminal Law of England* 273 (1883). Lord

Gordon's defense was that he did not intend to encourage these extreme acts but merely to engage in petitioning. *Trial of Lord George Gordon*, 21 State Tr. 522, 591-592 (1781). Again, as in the *Dammaree* case, numerous statements made by members of the mob were admitted (see 21 State Tr. at 514-515, 526-527, 529-540).

The contemporary understanding of these precedents was shown in a string of treason trials in which the defendants were charged with trying to bring the French Revolution to England. For example, in the *Trial of Thomas Hardy*, 24 State Tr. 200, 453 (1794), Lord Chief Justice Eyre relied on *Dammaree* and *Gordon* for the proposition that "the correspondence of one man who is a party in a conspiracy, would undoubtedly be evidence, correspondence in furtherance of the plot." Justice Buller observed (24 State Tr. at 452) (footnotes omitted):

> In Dammaree and Purchase's cases evidence was received of what some of the parties had done when the prisoner was not there. The attorney general says, I call this witness, not to speak in particular to the prisoner, but to shew the intention of the mob. * * * In the cases that have happened in our own time, in Lord George Gordon's case, evidence of what different persons of the mob had said, though he was not there, was admitted.

See also *Trial of John Horne Tooke*, 25 State Tr. 1 (1794); *Trial of William Stone*, 25 State Tr. 1155, 1277-1278 (1794). In sum, at the time of the adoption of the Bill of Rights, the co-conspirator rule was, if not firmly established, at least very clearly foreshadowed in English law.

In this country, the co-conspirator rule was adopted by the Supreme Court of New Jersey in 1791, the very year in which the Bill of Rights was ratified. *Patton* v. *Freeman*, 1 N.J.L. 113, 115 (1791). Similar decisions were soon handed down by the highest courts of Vermont, Virginia, and Pennsylvania. *Broughton* v. *Ward*, 1 Tyl. 137, 139 (Vt. 1801); *Claytor* v. *Anthony*, 27 Va. (6

Rand.) 285, 300-301 (1828); *Reitenbach* v. *Reitenbach*, 1 Rawle 362, 365 (Pa. 1829). This Court first recognized the co-conspirator rule in *United States* v. *Gooding*, 25 U.S. (12 Wheat.) 459 (1827). Justice Story, the author of that opinion, made clear in his constitutional treatise that he did not perceive any inconsistency between the Confrontation Clause and traditional hearsay exceptions. The Confrontation Clause, he wrote, "does but follow out the established course of the common law in all trials for crimes. The trial is always public; the witnesses are sworn, and give their testimony (at least in capital cases) in the presence of the accused." 3 J. Story, *Commentaries on the Constitution* 662 (2d ed. 1833).

In our view, this history weighs very heavily against the view that the traditional co-conspirator rule—with criteria for admissibility that include no requirement of a showing of unavailability or of an individualized determination of reliability of particular statements otherwise satisfying the rule—is inconsistent with the Confrontation Clause.

5. The meaning of the Confrontation Clause is also illuminated by the views of judges of the early and mid-19th century, who evinced no doubt about the origin and scope of the right to confrontation and were firmly of the view that this right did not call into question the validity of traditional hearsay exceptions.

In *Woodsides* v. *State*, 3 Miss. (2 Howard) 655 (1837), the Mississippi High Court of Errors and Appeals held that the confrontation clause in the state constitution did not preclude the admission of a dying declaration. The court stated (*id.* at 665) that the confrontation requirement "was but an affirmation of a long cherished principle of the common law," *i.e.*, that "the accused is secured in the right of an oral examination of the opposing witnesses, and of the advantages of a cross-examination."

Admission of a dying declaration did not abridge the defendant's right "to be confronted with the witness against him," the court explained (*ibid.*), because "the murdered individual is not a witness." "It is the individual who swears to the statements of the deceased that is the witness" (*ibid.*).

During this period, several other state courts heard similar objections to the admission of dying declarations, to which they invariably gave the same answer. The Supreme Court of Tennessee wrote (*Anthony* v. *State*, 19 Tenn. (Meigs) 265, 277-278 (1838)), that the purpose of the state confrontation clause "was not to introduce a new principle" but to perpetuate a right won in England "after a long contest" with the crown. The Supreme Court of Georgia wrote (*Campbell* v. *State*, 11 Ga. 353, 374 (1852)):

> The right of a party accused of a crime, to meet the witnesses against him, face to face, is no new principle. It is coeval with the Common Law. * * * The argument for the exclusion of the testimony [respecting the dying declaration], proceeds upon the idea that the deceased is the witness, when in fact it is the individual who swears to the statements of the deceased, who is the witness. * * *
>
> The admission of dying declarations in evidence, was never supposed, in England, to violate the well-established principles of the Common Law, that the witnesses against the accused should be examined in his presence.

See also, *e.g.*, *State* v. *Tilghman*, 33 N.C. (11 Ired.) 513, 554 (1850); *Commonwealth* v. *Carey*, 16 Mass. (12 Cush.) 246 (1851); *Lambeth* v. *State*, 23 Miss. 322, 357 (1852); *Walston* v. *Commonwealth*, 55 Ky. (16 B. Mon.) 15, 25 (1855); *State* v. *Waldron*, 16 R.I. 191, 193-195 (1888).

6. As we have seen, the jurists and scholars of the 18th and early 19th centuries saw no contradiction between the right to confrontation and the admission of out-of-court statements falling within exceptions to the

hearsay rule. For them, the difference between trial by affidavit and the recognition of hearsay exceptions was so obvious that they apparently saw no need to articulate the reasons for prohibiting the former while allowing the latter. But the reasons can easily be explained.

An affidavit or deposition, particularly if created ex parte, is ordinarily nothing but a less desirable substitute for live testimony. It can be as detailed and comprehensive as the direct examination of a live witness. It can be crafted to make out all of the elements of a criminal charge. It is usually created with litigation in mind and thus is subject to all of the slanting and distortion that the pressures of litigation may produce. It is also usually created in the presence or with the cooperation (and thus under the potential influence) of one of the parties.

Most admissible hearsay shares none of these characteristics. It often consists of a few utterances (see, *e.g.*, Fed. R. Evid. 803(1) (present sense impressions), 803(2) (excited utterances)). It is rarely made during or even in contemplation of litigation (see, *e.g.*, Fed. R. Evid. 803(5) (past recollection recorded), 803(6) (business records)). And most admissible hearsay is widely thought to have probative value independent of whatever testimony the declarant might later give at trial. To take just one of many possible examples, a statement made for purposes of medical diagnosis or treatment (see Fed. R. Evid. 803(4)), when the declarant's health may lie in the balance, is thought to have a probative significance quite independent of and possibly greater than testimony that the declarant might later give in court. It is for this reason that the common law did not condition use of most hearsay exceptions upon a showing of unavailability by the proponent of the evidence and that 23 of 27 specific hearsay exceptions in the Federal Rules of Evidence apply irrespective of the declarant's availability. Compare Fed. R. Evid. 803(1)-(23) with Fed. R. Evid. 804(b)(1)-(4).

There are, however, a few types of potentially admissible hearsay that can aptly be compared to an affidavit or deposition, and it is there that the requirements of the Confrontation Clause and the hearsay rules overlap. Former testimony (see Fed. R. Evid. 804(b)(1)) is the most striking example. Absent special circumstances, former testimony is simply a next-best substitute for live testimony and therefore is admissible as substantive evidence under the Federal Rules only if the declarant is unavailable. Former testimony may be similar in breadth and detail to live testimony. It occurs in a court proceeding—often a proceeding related to that in which it is later sought to be introduced. And even when accompanied by cross-examination, former testimony is thought to be generally less reliable than live testimony because the trier of fact cannot observe the witness's demeanor. Fed. R. Evid. 804(b)(1) advisory committee note.

A third party's confession, which may fall within the modern exception for declarations against penal interest (Fed. R. Evid. 804(b)(3)), is another example of hearsay that may properly be subject to close regulation under the Confrontation Clause. Confessions may have all the breadth and detail of an affidavit or deposition. And like the affidavits and depositions obtained by examining magistrates in the 17th century, confessions are generally obtained ex parte, in contemplation of litigation, and with the participation of prosecutorial authorities.

The court of appeals' erroneous decision in the present case resulted from a failure to appreciate the difference between those types of potentially admissible hearsay that are analogous to ex parte affidavits and depositions and are thus properly subject to close Confrontation Clause scrutiny and the remaining traditional hearsay exceptions, which should be regarded as presumptively valid.

B. This Court's Confrontation Clause Decisions Have Closely Regulated The Admission Of Former Testimony But Have Treated Most Other Traditional Hearsay Exceptions As Presumptively Valid

This Court's Confrontation Clause cases disclose a three-part approach to the admission of hearsay. First, this Court has closely regulated the admission of hearsay, such as former testimony, that is broadly analogous to an affidavit or deposition. The vast bulk of this Court's Confrontation Clause cases have dealt with former testimony and thus fall into this category. Second, the Court has not subjected other traditional hearsay exceptions to the same close regulation. Recognizing that the Confrontation Clause and the hearsay rule both embody the view that live testimony, with an opportunity for cross-examination, is generally the most reliable form of evidence, the Court has regarded time-tested hearsay exceptions as presumptively consonant with the Constitution. Third, the Court has held out the possibility of closer examination of any new and radical departures from traditional hearsay rules.

1. Most of this Court's Confrontation Clauses cases dealing with hearsay have concerned the propriety of admitting former testimony. As previously noted, former testimony is comparable in several critical respects to an affidavit or deposition, and thus close regulation of this type of hearsay is consistent with the historical roots of the confrontation right.

This close examination has focused first upon the availability of the declarant to give live testimony. As earlier discussed, former testimony usually is simply an inferior substitute for live testimony, and accordingly there is generally no reason to admit former testimony if live testimony can reasonably be obtained. Thus, from the Court's first Confrontation Clause case, *Reynolds* v. *United States*, 98 U.S. 145 (1879), to *Ohio* v. *Roberts*, 448 U.S. 56 (1980), the Court has explored the circumstances in which there is sufficient reason to permit the

prosecution to use a substitute for live testimony. The Court has found adequate cause for admitting former testimony where the absence of the declarant was procured by the defendant (*Reynolds*, 98 U.S. at 158-161), where the declarant had died (*Mattox* v. *United States*, 156 U.S. 237 (1895)), where the declarant had left the country and was beyond the reach of the court's process (*Mancusi* v. *Stubbs*, 408 U.S. 204 (1972)), and where the declarant was a young person who had left home, was "traveling," and could not be located by her parents or by the authorities (*Ohio* v. *Roberts*, *supra*). By contrast, the Court has held that resort to former testimony was not justified where the government negligently allowed the declarant to slip out of the courthouse before testifying (*Motes* v. *United States*, 178 U.S. 458 (1900)), and where the state did not pursue available procedures for obtaining the presence in court of a declarant incarcerated in a federal prison in another state (*Barber* v. *Page*, 390 U.S. 719 (1968)).

Roberts summarized this case law as follows (448 U.S. at 65):

> In the usual case (including cases where prior cross-examination has occurred), the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant. See *Mancusi* v. *Stubbs*, 408 U.S. 204 (1972); *Barber* v. *Page*, 390 U.S. 719 (1968). See also *Motes* v. *United States*, 178 U.S. 458 (1900); *California* v. *Green*, 399 U.S. at 161-162, 167 n.16.[7]

[7] A demonstration of unavailability, however, is not always required * * *.

The court of appeals in this case (Pet. App. 12a) interpreted this passage to mean that a demonstration of unavailability is generally required before *any* hearsay can be admitted, but in our view this statement must have been intended to describe only the exception for former testimony. The four cases cited by the Court all

involved former testimony. The Court's suggestion that "the usual case" may feature "prior cross-examination" also indicates that the Court had former testimony in mind, since no other type of hearsay statement is likely to have been subjected to prior cross-examination. Moreover, since most traditionally admissible hearsay has a probative value independent of any testimony that the declarant might later give, it would be strange to bar the admission of such hearsay on the ground that the declarant was available to testify. Twenty-three of the 27 specific hearsay exceptions recognized in the Federal Rules of Evidence do not require the unavailability of the declarant. Fed. R. Evid. 803, 804. If the court of appeals' reading of *Roberts* were correct, all of these exceptions (and thus a substantial portion of the federal hearsay rule) would contravene the Confrontation Clause. We do not believe that the *Roberts* Court intended to embrace such a revolutionary proposition in such an offhand manner.

In addition to unavailability, the second question in this Court's former testimony cases has been whether the former testimony was given under circumstances providing sufficient guarantees of trustworthiness. All hearsay exceptions identify circumstances thought to provide sufficient assurance of reliability that it is deemed better to let the fact-finder hear and weigh the evidence than to exclude it entirely. For example, some types of hearsay are thought to possess qualities of reliability because uttered in circumstances that preclude reflection or conscious fabrication[28] or in circumstances in which the declarant has a strong self-interest in making a truthful statement.[29] With respect to former testimony, which

[28] See, *e.g.*, Fed. R. Evid. 803(1) (present sense impression), 803(2) (excited utterance), 803(3) (then existing mental, emotional, or physical condition).

[29] See, *e.g.*, Fed. R. Evid. 803(4) (statements for purposes of medical diagnosis or treatment), 803(6) (records of regularly conducted activity).

lacks these reassuring characteristics, trustworthiness is instead advanced by legal procedures at the proceeding in which the former testimony is given. In its former testimony cases, this Court has considered the adequacy of these safeguards and has found them satisfactory where the former testimony was given under oath and was cross-examined, or where there was at least opportunity and similar motive for cross-examination or its equivalent. See *Reynolds*, 98 U.S. at 161; *Mattox*, 156 U.S. at 249; *California* v. *Green*, 399 U.S. 149, 165-168 (1970); *Ohio* v. *Roberts*, 448 U.S. at 67-73. Not only is this close examination of the trustworthiness of former testimony consistent with the historical purpose of the Confrontation Clause, but it is singularly appropriate in this context because it entails an evaluation of court procedures rather than the psychological judgments about human behavior outside the courtroom that underlie most of the other traditional hearsay exceptions.

Besides these former testimony cases, the Court has also decided several Confrontation Clause cases involving the use of third-party confessions. As previously noted, such confessions, like former testimony, bear sufficient resemblance to ex parte affidavits or depositions to call for close examination under the Confrontation Clause. Accordingly, in *Douglas* v. *Alabama*, 380 U.S. 415 (1965), the Court found a Confrontation Clause violation where the prosecuting attorney, in the guise of refreshing the recollection of an accomplice who refused to testify on the ground of self-incrimination, read the accomplice's confession to the jury. And in *Bruton* v. *United States*, 391 U.S. 123 (1968), the Court held that the Confrontation Clause was violated by the admission at a joint trial of a confession made by a non-testifying defendant and implicating his co-defendant.[30]

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[30] See also *Tennessee* v. *Street*, No. 83-2143 (May 13, 1985) (no *Bruton* violation where confession introduced for non-hearsay purposes); *Parker* v. *Randolph*, 442 U.S. 62 (1979) (application of *Bruton* to interlocking confessions); *Brown* v. *United States*, 411 U.S. 223, 230-232 (1973) (*Bruton* error harmless); *Schneble* v. *Florida*, 405 U.S. 427 (1972) (*Bruton* error harmless); *Nelson* v. *O'Neill*, 402 U.S. 622 (1971) (*Bruton* does not apply where co-defendant testifies in defendant's favor and denies incriminating statement); *Harrington* v. *California*, 395 U.S. 250 (1969) (*Bruton* error harmless); *Roberts* v. *Russell*, 392 U.S. 293 (1968) (*Bruton* retroactive and applies to the states).

2. The Court has taken a very different approach to other traditional hearsay exceptions. On the few occasions when such exceptions have been challenged under the Confrontation Clause, the challenges were firmly rebuffed. In *Delaney* v. *United States*, 263 U.S. 586, 590 (1924), the Court rejected a Confrontation Clause objection to the admission of co-conspirator statements, tersely observing that the statements were "within the ruling of the cases" of this Court recognizing the co-conspirator rule. Two years later, in *Salinger* v. *United States*, 272 U.S. 542, 547-548 (1926), the Court considered a Confrontation Clause challenge to documentary evidence admitted as res gestae. Noting that the evidence had hearsay and non-hearsay components (272 U.S. at 547-548), the Court rejected the Confrontation Clause argument, stating (*id.* at 548):

> The right of confrontation did not originate with the provision in the Sixth Amendment, but was a common-law right having recognized exceptions. The purpose of that provision, this Court often has said, it to continue and preserve that right, and not to broaden it or disturb the exceptions. * * * * The present contention attributes to the right a much broader scope than it had at common law * * *.

The Court has also repeatedly commented on the presumptive constitutionality of statements falling within traditional hearsay exceptions. In *Mattox*, 156 U.S. at 237, the Court stated that the Clause must be interpreted "in the light of the law as it existed at the time it was adopted," including "exceptions [that were] recognzed long before the adoption of the Constitution * * * [and that] were obviously intended to be respected" (*id.* at 243). Noting the settled hearsay exception for dying declarations, the Court stated (*id.* at 243-244) that "no

one would have the hardihood at this day to question their admissibility." See also *Pointer* v. *Texas*, 380 U.S. at 407.

In *Dutton* v. *Evans*, 400 U.S. 74 (1970), which involved a state provision expanding the traditional co-conspirator rule, the plurality noted and appeared to disapprove (*id.* at 80) the lower court's interpretation of the Confrontation Clause, because it would "require[] a reappraisal of every exception to the hearsay rule, no matter how long established, in order to determine whether * * * it is supported by 'salient and cogent reasons.'" The plurality continued (400 U.S. at 80) that it did "question the validity of the co-conspirator exception applied in the federal courts."

Ohio v. *Roberts*, *supra*, capsulized this approach by stating that "certain hearsay exceptions rest upon such solid foundations that admission of virtually any evidence within them comports with the 'substance of the constitutional protection'" (448 U.S. at 66, quoting *Mattox*, 156 U.S. at 244).

The reasons for this approach are apparent. Although doctrinally discrete, the Confrontation Clause and the hearsay rule are both based upon the view that live testimony with the opportunity for cross-examination is generally the best procedure for discovering the truth. But more than 400 years of experience have given rise to many refinements of the general prohibition against hearsay, and a consensus has been reached, both here and throughout the common-law world, that certain types of hearsay statements are sufficiently trustworthy to permit their admission and evaluation by the trier of fact. This Court has declined to overrule the collective judgment of the countless common law judges, scholars, and legislators whose experiences and thinking are embodied in the traditional hearsay exceptions. As the Court succinctly put it in *Roberts* (448 U.S. at 66): "Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception."

The concept of "reliability" in hearsay and Confrontation Clause analysis is both narrower and broader than

one might generally suppose. It is narrower, in part, because the question raised by an objection to hearsay on the ground of reliability is not whether the particular evidence is true or believable (much live testimony, after all, is neither) but whether the evidence is by its nature so misleading that the trier of fact should not even be allowed to hear it. Moreover, when this Court is called upon to propound a standard of constitutionally required reliability, the Court's task is not to evaluate which of many possible rules of admission or exclusion is the soundest "purely as a matter of the law of evidence" (*California* v. *Green*, 399 U.S. at 155). Rather, the Court must articulate durable, national standards that will assure minimum levels of trial fairness without unduly restricting federal and state evidence law either now or for the future.

The concept of "reliability" in the present context is broader than might otherwise be assumed because the judgment underlying most of the traditional hearsay exceptions is that statements falling within those categories "possess circumstantial guarantees of *trustworthiness sufficient to justify nonproduction of the declarant in person at trial even though he may be available.*" Fed. R. Evid. 803 advisory committee note (proposed rules) (emphasis added). Thus, respect for the process of incremental legal development that has refined the traditional hearsay rules leads to the conclusion that evidence falling within most of the traditional hearsay exceptions is trustworthy enough for admission whether or not the declarant is available. It would be strange to defer to only one-half of this unitary evolutionary judgment.

3. While this Court has not questioned the constitutionality of most traditional hearsay exceptions, it has left open the possibility that novel exceptions or radical departures may be tested against stricter standards. In *Dutton* v. *Evans*, *supra*, as previously noted, the Court considered the constitutionality of admitting evidence under just such an exception—a Georgia variation of the traditional co-conspirator rule that permitted the admission of statements made during the concealment phase of

the conspiracy. Without intimating that it would be appropriate "to require a constitutional reassessment of every established hearsay exception" (400 U.S. at 80), the *Dutton* plurality weighed the constitutionality of admitting the co-conspirator statement in that case and found no Confrontation Clause violation. In support of this conclusion, the plurality noted that the challenged statement was "of peripheral significance" (400 U.S. at 87), that the co-conspirator's statement bore "indicia of reliability" (*id.* at 89), and that the value of cross-examining the co-conspirator declarant was "wholly unreal" (*ibid.*).

At most, the *Dutton* plurality opinion suggests that novel hearsay exceptions may be subject to closer analysis than those that have become established through the common law process. We see little justification for the drastic view of those courts, including the Third Circuit, that have read *Dutton* to restructure the law of evidence by introducing a general requirement that each piece of hearsay evidence be separately assessed for reliability even if it falls within a general class recognized under the law of evidence as admissible despite its hearsay character.[31] Instead, the *Dutton* plurality should be taken at its word, *i.e.*, that it was merely "deciding the case before [it]" (400 U.S. at 86). Moreover, two of the four members of the plurality, Justice Blackmun and the Chief Justice, thought that the case could have been decided on the basis of harmless error (*id.* at 90-93), and the fifth member of the majority, Justice Harlan, would have adopted Wigmore's view that the Confrontation Clause does not " 'prescribe what kinds of testimonial statements * * *

[31] See, *e.g.*, *United States* v. *Ordonez*, 737 F.2d 793, 802-804 (9th Cir. 1983); *United States* v. *Ammar*, 714 F.2d 238, 254-257 (3d Cir. 1983), cert. denied, 464 U.S. 936 (1983); *United States* v. *Wright*, 588 F.2d 31, 37-38 (2d Cir. 1978), cert. denied, 440 U.S. 917 (1979); *United States* v. *Kelley*, 526 F.2d 615, 620-621 (8th Cir. 1975), cert. denied, 424 U.S. 971 (1976); *United States* v. *Snow*, 521 F.2d 730, 734-735 (9th Cir. 1975), cert. denied, 423 U.S. 1090 (1976).

shall be given infra-judicially' " (400 U.S. at 94, quoting 5 *Wigmore on Evidence* § 1397, at 131 (3d ed. 1940)).[32]

C. Reevaluating The Co-Conspirator Rule And Other Traditional Hearsay Exceptions Under The Confrontation Clause Would Be Pointlessly Duplicative And Disruptive And Would Stultify The Evolution Of Federal And State Rules Of Evidence

1. If most traditional hearsay exceptions are not presumptively constitutional, the Court will be compelled to

[32] In addition to the cases surveyed in the text, the Court has decided Confrontation Clause cases that did not concern the admission of evidence and are thus not relevant for present purposes. Some of these cases involved restrictions on cross-examination. *E.g.*, *Davis* v. *Alaska*, 415 U.S. 308 (1974); *Chambers* v. *Mississippi*, 410 U.S. 284 (1973); *Smith* v. *Illinois*, 390 U.S. 129 (1968); *Brookhart* v. *Janis*, 384 U.S. 1 (1966). Others, like *Illinois* v. *Allen*, 397 U.S. 337 (1970), concerned the defendant's right to be present at trial. See also *Snyder* v. *Massachusetts*, 291 U.S. 97 (1934) (due process not violated by pretrial view of murder scene by jury without defendants' presence).

The unusual cases of *Kirby* v. *United States*, 174 U.S. 4 (1899), and *Dowdell* v. *United States*, 221 U.S. 325 (1911), also did not concern the admission of evidence. In *Kirby*, the Court struck down a statute providing that in a prosecution for receipt and possession of stolen stamps the thieves' judgment of conviction was conclusive proof that the stamps were stolen. Invoking the Confrontation Clause, the first Justice Harlan noted (174 U.S. at 54) that the defendant against whom the judgments were admitted had not been present at the thieves' trial and that, as a non-party, he could not have cross-examined them even if he had been there. But as the second Justice Harlan suggested (*Dutton* v. *Evans*, 400 U.S. at 98-99), the more fundamental error was a misapplication of principles of res judicata that amounted to a denial of due process. See *Sandstrom* v. *Montana*, 442 U.S. 510 (1979); cf. Fed. R. Evid. 803(22).

Dowdell likewise did not involve the admission of hearsay but what is perhaps best viewed as judicial notice of court records relating to a claim of procedural error. The Supreme Court of the Philippine Islands had directed the trial judge, court reporter, and court clerk to forward certificates relating whether the defendants had been arraigned, whether they had entered a plea, and whether they had been present at their trials (221 U.S. at 327-328). This Court held that the right to confrontation allowed this procedure because the trial judge, reporter, and clerk did not "testify to facts concerning * * * guilt" (*id.* at 330-331).

reevaluate all of these exceptions and the numerous variations that have grown up in federal and state evidence law. This would be, in our view, a pointlessly duplicative process. As we have observed, the traditional exceptions to the hearsay rule embody the thinking and experience of generations of judges, legislators, scholars, and practitioners about the kinds of evidence that fact-finders may safely be permitted to consider. Moreover, these exceptions have been forged with full consideration of the very concepts—reliability and availability of the declarant—that this Court identified in *Ohio* v. *Roberts*, 448 U.S. at 65-66, as material under the Confrontation Clause. In developing the proposed Federal Rules of Evidence, for example, the advisory committee carefully considered whether each of the hearsay exceptions possessed sufficient "guarantees of trustworthiness." Fed. R. Evid. art. VIII advisory committee note. The advisors likewise considered whether each exception should contain a requirement of unavailability. See Fed. R. Evid. 803, 804 & advisory committee notes. This scheme was reviewed, revised, and adopted by this Court. 56 F.R.D. 183 (1972). It was again reviewed, revised, and adopted by Congress. Pub. L. No. 93-595, § 1, 88 Stat. 1926. It is puzzling, therefore, what it is thought would be gained by repeating this process under the aegis of the Confrontation Clause.

The argument that this Court should reexamine the federal co-conspirator rule under the light of the Confrontation Clause seems particularly pointless, for that rule in its modern form is in every sense the creation of this very Court. This Court adopted the rule more than a century and a half ago in *United States* v. *Gooding*, 25 U.S. (12 Wheat.) 460, 469-470 (1827), and since then has frequently reaffirmed, applied, and refined it. See, *e.g.*, *United States* v. *Nixon*, 418 U.S. 683, 701 (1974); *Anderson* v. *United States*, 417 U.S. 211, 218 (1974); *Dutton* v. *Evans*, 400 U.S. 74, 81 (1970); *Wong Sun* v. *United States*, 371 U.S. 471, 490 (1963); *Lutwak* v. *United States*, 344 U.S. 604, 617-618 (1953); *Krulewitch* v. *United States*, 336 U.S. 440, 442-443 (1949); *Glasser* v. *United States*, 315 U.S. 60, 74-75 (1942); *Wiborg* v. *United States*, 163 U.S. 632, 657-658 (1896); *Clune* v. *United States*, 159 U.S. 590, 593 (1895); *St. Clair* v. *United States*, 154 U.S. 134, 149-150 (1894); *Brown* v. *United States*, 150 U.S. 93, 97-98 (1893); *Logan* v. *United States*, 144 U.S. 263, 308-309 (1892); *Nudd* v. *Burrows*, 91 U.S. 426, 438 (1875); *Lincoln* v. *Claflin*, 74 U.S. (7 Wall.) 132, 138-139 (1868); *American Fur Co.* v. *United States*, 27 U.S. (2 Pet.) 358, 364 (1829).[33] It seems to us virtually inconceivable that the Third Circuit and like-minded courts could be correct in their recent and astonishing discovery that this firmly anchored and carefully evolved body of doctrine articulated by this Court over the past 150 years fails to meet basic constitutional minima established in the Bill of Rights.

2. Our point is not that the traditional hearsay rules or the federal or state variations are perfect and should never be reexamined. On the contrary, periodic reexamination and refinement are essential. But this task should not be performed by this Court under the authority of the Confrontation Clause. Constitutionalizing the hearsay rules would stunt their development and preclude beneficial experimentation both at the federal and state levels. Both the Court and individual Justices have frequently observed that the Confrontation Clause should

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[33] Moreover, Fed. R. Evid. 801(d)(2)(E) was promulgated by this Court in precisely its present form. 56 F.R.D. at 293. From the Preliminary Draft of The Proposed Rules of Evidence submitted by the Advisory Committee of the Judicial Conference in March 1969 (see 46 F.R.D. 161, 331 (1969); Rule 8-01(c)(3)(v)), through the final version of the Rules submitted by this Court to Congress and passed by Congress in 1975, Pub. L. No. 93-595, art. VIII, 88 Stat. 1938, the co-conspirator exception remained unchanged and engendered no controversy. Both the Advisory Committee (see Fed. R. Evid. 801(d)(2)(E) advisory committee note) and the Senate committee (see S. Rep. 93-1277, 93d Cong., 2d Sess. 26-27 (1974)) viewed this rule as a codification of federal laws as it had evolved in the courts.

not be interpreted in a way that would stultify this development. See, *e.g.*, *Ohio* v. *Roberts*, 448 U.S. at 64-65; *Dutton* v. *Evans*, 400 U.S. at 80, 86 n.17; *California* v. *Green*, 399 U.S. at 156; *id.* at 171-172 (Burger, C.J., concurring).

The review of hearsay exceptions under the Confrontation Clause would also be enormously disruptive. To take the Federal Rules of Evidence as an example, this Court has thus far addressed the constitutionality of only two of the 27 specific exceptions—former testimony and dying declarations. If each of the remaining 25 exceptions, as well as the exemptions in Rule 801, must now be reassessed under the Confrontation Clause, the mode of proof in federal trials will be thrown into doubt pending the outcome of this reassessment. And the same will be true of all of the state variations. This thought is particularly sobering in view of the many decisions, from *Reynolds* in 1879 to *Roberts* in 1980, that have been required to hammer out the constitutional constraints affecting the single hearsay exception for former testimony.

D. Even If The Federal Co-Conspirator Rule Is Reevaluated Under The Confrontation Clause, No Sound Constitutional Policy Justifies Striking Down The Settled Rule That Co-Conspirator Declarations Are Admissible Without Regard To The Availability Of The Declarant

The court of appeals held in this case that the government may not introduce a statement falling within the co-conspirator rule unless it also produces the declarant or shows that he is unavailable to testify (Pet. App. 12a). This rule would exact a grave toll on the resources of the criminal justice system and would create a serious potential for disruption of prosecutions without benefiting the defendant in any significant legitimate way and without serving the Confrontation Clause's "mission [of] advanc[ing] 'the accuracy of the truth-determining process in criminal trials.'" *Tennessee* v. *Street*, No. 83-2143 (May 13, 1985), slip op. 6, quoting *Dutton* v. *Evans*, 400 U.S. at 89.

In assessing the practical wisdom of the court of appeals' rule, several factors must be kept in mind. First, not every case in which the prosecution wishes to introduce co-conspirator declarations will be as geographically or temporally compact as this one or involve just a few readily identifiable and locatable declarants. In the prosecution of large-scale drug conspiracy or organized crime cases, there may be literally dozens of conspirators whose statements the prosecution proposes to introduce. The task of locating, bringing to court, and adjudicating the testimonial availability of all of these individuals (none of whom the parties have independently decided to call as witnesses) can be massive indeed, and it is required by the decision below in every case, even though the defendant is under no obligation to ask a single question of any of these declarants once the prosecution has produced them.

1. The unjustifiable costs associated with the court of appeals' rule take several forms:

a. The first type of cost arises from the duty to produce the declarant in the court or satisfactorily demonstrate his physical unavailability. Even with respect to those individuals whose identity and whereabouts are known at the time of trial, this can be a burdensome and expensive undertaking. To begin with, because the co-conspirator/declarants are participants in criminal activity, many of them will be incarcerated, sometimes in facilities far removed from the venue of the trial. The problems associated with the need to transport such individuals to and from the courtroom under guard are manifest.

Among those co-conspirator/declarants who are not in custody and have not agreed to be prosecution witnesses, many if not most will have little interest in assisting the government in discharging its burden of production—especially if they realize that their failure to appear in court may delay or disrupt the prosecution's case or even preclude the admission of statements damaging to the defendants. Many of these individuals may still be in

league with, or at least sympathetic to, the defendants who who are on trial; they may be relatives, close friends, or business associates. Even if not personally sympathetic, they may fear that their appearance in court would lead to retaliation. Consequently, what will frequently happen is just what happened here. The co-conspirator/declarant will not appear in court as requested, making various excuses such as "car problems," illness, or lapse of memory. Until the declarant has disobeyed a subpoena (and thus disrupted the trial proceedings on at least one occasion), there will be no cause for issuing a bench warrant; and until a warrant is issued, the government has no ability to compel the attendance of a balky witness.

The failure of a declarant like Lazaro in this case to appear in court as requested will cause very serious practical problems. If he is apparently only temporarily unreachable—because he purportedly "has gone fishing," or is visiting a distant relative or taking a short vacation, or simply hasn't shown up in court for reasons as yet undetermined—he may not be "unavailable" within the meaning of the court of appeals' rule (indeed, he probably would not be considered unavailable within the meaning of this Court's precedents if the purpose of the inquiry were to determine the propriety of using former testimony). In such circumstances, the government would have the task of quickly finding the individual and bringing him in. Failing that, the court would be forced to grant a continuance (especially undesirable where the jury is sequestered), exclude the co-conspirator's statements, or perhaps even declare a mistrial if the statements have been previously admitted subject to later production of the witness by the prosecution. Once it is commonly understood that the temporary disappearance of the declarant can have such consequences, the frequency of such occurrences is likely to increase dramatically.

b. Apart from the burdens and expenses of securing the physical presence in court of known and locatable co-

conspirator/declarants, the court of appeals' rule imposes heavy costs on both prosecutors and courts arising from the process of establishing that declarants who have not appeared or who refuse to testify are indeed unavailable.[34]

In many instances, the declarant will not be identified by the prosecution or will not be locatable at the time of trial. In such cases, it will presumably be the prosecution's obligation to show the investigative avenues it pursued to identify or locate the declarant, and this in turn will lead to litigation about whether other leads or investigative techniques were reasonably available that might have brought about production of the declarant in court. The burden of showing in such cases that the co-conspirator/declarant cannot be found will be an onerous one, especially in prosecutions involving large-scale conspiracies that have operated over a period of years. Consider for instance the situation in which a conspiratorial conversation recorded by electronic surveillance includes statements made by unidentified speakers or speakers identified only by their first names or by aliases. How far must the prosecution go in its efforts to identify and produce such persons? See *United States* v. *Ordonez*, 737 F.2d at 802 (government failed to make sufficient showing that unknown maker of entries in drug business's ledger was unavailable). Consider also the case of a known declarant who has disappeared between the time of indictment and trial. To what extent does the government's duty of production make it a guarantor of the individual's availability at trial?

The existence of these kinds of questions opens virtually unlimited vistas of trial and appellate litigation whenever the government fails to produce the co-conspirator/declarant in court.[35] But even when produced,

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[34] Because the co-conspirator rule is used so much more often than any of the hearsay exceptions contained in Fed. R. Evid. 804, the burden of showing unavailability would far exceed that for those situations in which such a showing is required by rule.

[35] This point is well illustrated by the disagreement between the majority and the dissent in *Ohio* v. *Roberts*, *supra*, on whether unavailability had been satisfactorily demonstrated.

the declarant is likely to refuse to testify, necessitating the conduct of a hearing to evaluate any claim of privilege or an adjudication of contempt before a valid finding of unavailability may be made.[36]

c. Finally, even when the prosecution has brought to court a declarant who is willing to or can be compelled to testify, it is not clear from the court of appeals' opinion that its obligations are satisfied. The court held that the co-conspirator must be "produce[d] * * * for cross-examination." Pet. App. 12a; see also *United States* v. *Caputo*, 758 F.2d 944, 952 (3d Cir. 1985). Does this mean that the prosecution must conduct a direct examination of a co-conspirator who may well be in the defense camp and whose anticipated testimony the prosecution

[36] The majority of co-conspirator/declarants are likely to have a Fifth Amendment privilege available to refuse to testify regarding the conspiracy in which they were involved and the statements made by them during its course. (Even if already convicted of an offense or offenses arising from the conspiracy, there will remain a risk—theoretical if not real—of prosecution for related offenses or for the same offenses by a different sovereign.) Unless they have already agreed to cooperate with the prosecution or the defense by testifying at trial (and the present issue does not concern such individuals), they are likely to invoke their privilege and to be in fact unavailable. Even where it is obvious that this is what will transpire, the court of appeals' decision appears to require bringing these individuals to court solely for the formality of having them claim their privilege before the judge.

The court of appeals thought this burden could be alleviated by allowing the assertion of the privilege by affidavit, as its amended opinion suggests (Pet. App. 18a). Many co-conspirator/declarants, however, will not obligingly sign these affidavits, perhaps requesting the appointment of counsel to advise them with respect to their obligation to be available to testify. In addition, it is far from clear that defendants can be required to accept such affidavits rather than having the court assess the claim of privilege in light of specific questions that the defendant might propound. See *Hoffman* v. *United States*, 341 U.S. 479 (1951); *United States* v. *Rodriguez*, 706 F.2d 31, 34, 37 (2d Cir. 1983); *United States* v. *Horton*, 629 F.2d 577, 579 (9th Cir. 1980); *United States* v. *Goodwin*, 625 F.2d 693, 701 (5th Cir. 1980); *United States* v. *Hodgson*, 492 F.2d 1175, 1177 (10th Cir. 1974).

does not believe is true? What questions must be asked? If the court of appeals' decision requires the prosecutor to do anything more than make the co-conspirator available to be called by the defense, it constitutes a severe intrusion upon prosecutorial prerogative.

2. If the substantial costs associated with locating, producing, and litigating at trial and on appeal the availability or unavailability of every co-conspirator/declarant were offset by real and substantial gains to the fairness and reliability of the criminal trial, perhaps it would be justified to hold that the broadly accepted rule of evidence that has evolved over the years to regulate the admission of co-conspirator declarations is so fundamentally flawed as to be unconstitutional. In point of fact, however, the rule announced by the court of appeals in this case is likely to be almost all cost and no benefit.

a. First, the requirement cannot be justified on the ground that it serves to limit admission of an inferior type of evidence. Unless the prosecution makes a blunder in jumping through the necessary hoops, the evidence will be admitted. If the declarant is available and is produced, his out-of-court statements (unlike prior testimony) are fully admissible under the court of appeals' holding. And if the declarant is unavailable and the government shows this in court, his out-of-court statements are likewise to be admitted.[37]

[37] If the court of appeals' rule were recast in the mold of Fed. R. Evid. 804 to prohibit the admission of co-conspirator statements unless the declarant is unavailable, the rule would be objectionable on other grounds. Unlike former testimony, statements made by a co-conspirator in furtherance of a conspiracy are not an inferior substitute for live testimony by the declarant, but have discrete and independent probative value. Between the time the statements are made and the time of the trial, the situation of the declarant will have necessarily undergone such a dramatic transformation that his testimony will inevitably be seen in a very different light. This will be so whether at the time of trial he is cooperating with government, is allied with the defendants (out of sympathy or fear), or occupies a less well-defined position. Thus, the rule requiring unavailability as a prerequisite for the admission of co-conspirator

b. Even though the evidence is admissible whether the declarant is unavailable or is produced, there will of course be some cases in which, like here, the prosecution fails to produce the declarant but also fails to demonstrate unavailability to the satisfaction of the trial court (leading, as discussed above, to continuance, exclusion of evidence, or mistrial) or to the satisfaction of the court of appeals (leading to reversal of the conviction). The possibility of such results will no doubt provide substantial incentives to prosecutors to do all in their power (at the cost of considerable drain on available investigative and prosecutive resources) to assure that co-conspirator/declarants are produced in court. But there is little basis for concluding that these added incentives to the prosecution will materially increase the number of co-conspirator/declarants who can actually be made available to testify; and to the extent some are made available who otherwise would not be, it is by no means clear that they would be called upon by the defense to give evidence. In other words, the new constitutional requirement created by the court of appeals cannot be justified on the basis that it will bring needed additional evidence before the trier of fact.

To begin with, if a declarant is slated to testify for either the prosecution or the defense independently of any rule relating to the admissibility of his out-of-court statements, the court of appeals' decision will not produce any additional evidence for consideration by the trier of fact. Accordingly, we deal here only with those declarants whom neither side wishes to call to the stand as part of its case. Here, for example, the defense did not

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statements, unlike the unavailability requirement applicable to former testimony, cannot be defended as a best evidence rule. Davenport, *The Confrontation Clause and the Co-Conspirator Exception in Criminal Prosecutions: A Functional Analysis*, 85 Harv. L. Rev. 1378, 1403 (1972). Live testimony is different from but not necessarily better than statements made during the execution of the conspiracy.

subpoena the declarant Lazaro or make any other efforts to secure his presence in court.[38]

Despite the added incentives to produce non-witness/co-conspirator/declarants generated by the court of appeals' rule, we think it quite clear that their actual availability to give testimony will not be materially increased. Many of these individuals will not be locatable despite reasonable efforts to do so, and most of those produced in court will invoke the Fifth Amendment privilege (see note 40, *supra*).

But even as to those non-witness/declarants who can be produced in court and are willing to or can be compelled to give testimony, we seriously doubt whether the defense will actually wish to examine them. After all, these are potential witnesses whom the defense has not independently elected to call as part of its case. Many of them will be individuals whose present sympathies are in doubt and whose likely testimony cannot reliably be ascertained, making it too risky for either party to examine them. Others, if forced to testify, would give evidence favorable to the prosecution. And even as to those declarants who would be prepared to disavow the making of the declaration introduced by the prosecution, testify that it was a lie, or give it an exculpatory explanation, many of them would be subject to such devastating cross-examination by the prosecution that their testimony would be worthless or positively damaging to the defense. In the instant case, respondent's counsel, while demanding that the government prove Lazaro's unavailability (J.A. 17), was unwilling to commit herself to having him testify if available to do so (J.A. 18).

In general, if the defense would not call such an individual as part of its case (whether as a regular or a hostile witness), it is not all clear why the defense would wish to examine the individual if produced by the government pursuant to a Confrontation Clause obligation.

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[38] Moreover, if the defense had subpoenaed Lazaro, the case would be more properly analyzed under the Compulsory Process rather than the Confrontation Clause.

In any event, in those few cases in which (1) the witness is available to testify and (2) the defense actually wants to question him at trial, it will ordinarily be as easy for the defense to arrange for the declarant's appearance as for the prosecution to do so (as it would have been here). It simply makes no sense to allocate to the prosecution the burden of producing or proving the unavailability of *every* co-conspirator/declarant rather than simply requiring the defense to call as witnesses those very few who are in fact available and whose testimony the defense actually desires. In sum, we seriously doubt whether the court of appeals' rule, while gravely burdening the criminal process, will produce anything more than negligible benefits.

II. IF PROOF OF UNAVAILABILITY IS A PREREQUISITE FOR ADMISSION OF A CO-CONSPIRATOR STATEMENT, THE COURT OF APPEALS SHOULD HAVE ORDERED A REMAND HEARING TO DETERMINE THE QUESTION OF UNAVAILABILITY RATHER THAN ORDERING A NEW TRIAL

Even if the court of appeals were correct in holding that the government may not introduce a co-conspirator statement without producing the declarant or establishing that he is unavailable, the court erred in ordering a new trial without giving the government an opportunity on remand to prove unavailability. At trial, the district court admitted Lazaro's taped conversations without demanding proof of unavailability. Because of this ruling, proof of unavailability would have been superfluous; the government had already won the evidentiary contest. Accordingly, the government should not be penalized for failing to prove a point that, at the time of trial, it had no reason to prove.

Even more important, requiring a new trial without a remand hearing would gratuitously punish society and waste judicial and prosecutorial resources if, on a remand hearing, the government would be able to show that Lazaro was indeed unavailable. In such an event, his out-of-court statements were properly admitted and

there would be no need for a retrial. A retrial would be a wasteful and meaningless gesture because it would simply duplicate the first trial: the identical proof would be presented to a new jury. In the meantime, this unnecesasry replay of the first trial will preclude the judge and prosecutor from trying another case. Both society and other defendants will suffer from the delay of trials that had already been scheduled. See *United States* v. *Gibbs*, 739 F.2d 838, 857-858 (3d Cir. 1984) (en banc) (Seitz, J., dissenting).

This Court has repeatedly eschewed remedies that are more harsh than needed to correct the asserted error. See, *e.g.*, *United States* v. *Bagley*, No. 84-48 (July 2, 1985); *United States* v. *Hasting*, 461 U.S. 499 (1983); *United States* v. *Morrison*, 449 U.S. 361 (1981); *United States* v. *Blue*, 384 U.S. 251, 255 (1966). This Court has shown particular reluctance to grant relief where the asserted error has not diminished the reliability of the verdict. See *United States* v. *Leon*, No. 82-1771 (July 5, 1984), slip op. 7-9. In the present case, if Lazaro was in fact unavailable, and there was no Confrontation Clause violation, allowing the government to prove his unavailability after rather than before the out-of-court statements were introduced does not in any way reflect on the proof of respondent's guilt.

This Court has expressly recognized the advantage of remanding for a limited hearing that would give the trial court an opportunity to apply the correct law where the result of doing so might be to obviate the need for retrial of the entire case. Thus, in *Goldberg* v. *United States*, 425 U.S. 94 (1976), the Court remanded the case to the district court for a determination whether, under the correct standard, the particular writings in question qualified as Jencks Act material that the government should have produced. *Id.* at 111. In so doing, the Court stated (*id.* at 111-112 (footnote omitted)):

> [W]e do not think that this Court should vacate [petitioner's] conviction and order a new trial, since petitioner's rights can be fully protected by a remand

> to the trial court with direction to hold an inquiry consistent with this opinion. The District Court will supplement the record with findings and enter a new final judgment of conviction if the court concludes after the inquiry to reaffirm its denial of petitioner's [Jencks Act] motion. This procedure will preserve petitioner's opportunity to seek further appellate review on the augmented record. On the other hand, if the court concludes that the Government should have been required to deliver the material, or part of it, to petitioner, and that the error was not harmless, the District Court will vacate the judgment of conviction and accord petitioner a new trial.

See also, *e.g.*, *Walker* v. *Georgia*, No. 83-321 (May 21, 1984), slip op. 9-11; *United States* v. *Wade*, 388 U.S. 218, 242 (1967); *Jackson* v. *Denno*, 378 U.S. 368, 394 (1964); *Brady* v. *Maryland*, 373 U.S. 83, 88-91 (1963); *Campbell* v. *United States*, 365 U.S. 85, 98-99 (1961). The court of appeals should have followed the same procedure here.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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In The

Supreme Court of the United States

October Term, 1985

UNITED STATES OF AMERICA,

Petitioner,

v.

JOSEPH INADI,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether the Confrontation Clause requires that the government make a good faith effort to produce a co-conspirator whose out-of-court declarations it seeks to use against the defendant at trial.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

STATEMENT OF THE CASE

Respondent was convicted by a jury of one count of conspiring to manufacture and distribute methamphetamine, and of four counts of related offenses. His conviction was reversed by the Court of Appeals for the Third Circuit because the government had failed to produce at trial or demonstrate the unavailability of an alleged co-conspirator whose declarations were introduced at trial.

As the Court of Appeals noted (Pet. App. 4a), five tape-recorded telephone conversations were the "linchpins of the government's case". Three of these conversations were between respondent and one John Lazaro, an unindicted co-conspirator. Portions of each of the conversations were conducted in code language, as the government concedes (Pet. 4a), and the government asked two witnesses at the trial to translate those conversations for the jury. (2 Trs. 104-5; 4 Trs. 444.) Mr. Lazaro did not testify at trial. The fourth conversation played to the jury involved Marianne Lazaro (John Lazaro's wife) and Michael McKeon, both unindicted co-conspirators who testified at trial pursuant to grants of immunity. The fifth tape recording was of a conversation between John Lazaro and William Levan, an unindicted co-conspirator. Mr. Levan did not testify at trial, having appeared out of the presence of the jury and invoked his privilege against self-incrimination. The jury returned its verdict shortly after listening to the Levan-Lazaro tape a second time.[1]

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[1] After several hours of deliberation, the jury requested and obtained permission to listen again to the Levan-Lazaro conversation. (6 Trs. 665.) The jury did not have the tapes with them during their deliberations, and requested access only to this one.

Respondent objected at trial that Lazaro's recorded statements were inadmissible under the Confrontation Clause because the government had neither produced Lazaro for trial nor demonstrated his unavailability. The government took the position that it did not have to show Lazaro's unavailability. (3 Trs. 288.) The government's attorney represented to the district court that Lazaro had advised her that he would refuse to testify if called, despite her warnings that if he did so he faced penalties for contempt. (13 Trs. 292.)

The district court conditionally admitted the Lazaro conversations in reliance on the prosecutor's representation that she would produce Lazaro and that he would refuse to testify. (3 Trs. 292-3.) The government made no claim at trial that Lazaro had any legitimate Fifth Amendment privilege upon which to base a refusal to testify. That contention was raised first in its brief to the Court of Appeals. In the trial court the government took the contrary position, suggesting that Lazaro had no such claim of privilege (4 Trs. 408), and explaining his absence as "apparently" due to "car problems" (*Id.*). The trial court then expressly agreed to hear Lazaro out of the presence of the jury upon his arrival (*Id.*). The government, however, did not at any time call Lazaro to testify, either before the jury or out of its presence. The order which finally admitted the Lazaro conversations contained no response to respondent's continuing objection to the failure to produce him for cross-examination. (5 Trs. 574-5.)

On this record, the Court of Appeals ruled that admission of the Lazaro conversations was error, despite

their qualification as co-conspirator declarations under Fed.R.Evid. 801(d) (2) (E), because the government had failed either to produce Lazaro for cross-examination or to make the "*minimal* showing of unavailability that will satisfy the Confrontation Clause" (Pet. App. 14a-15a) (emphasis in original). It relied for its holding on this Court's decision in *Ohio v. Roberts*, 448 U.S. 56 (1980), in which the Court ruled that, "in conformance with the Framers' preference for face-to-face accusation", normally "the prosecutor must either produce, or demonstrate the unavailability of, the declarant whose statement it wished to use against the defendant." 448 U.S. at 65. (Pet. App. 12a.) The Court of Appeals also noted that the government argued that it was not required to demonstrate the unavailability of a nontestifying co-conspirator declarant, but had "not suggest[ed] any reason why we should create an exception to the clear constitutional rule laid down in *Roberts*." (Pet. App. 12a; footnote omitted.)

The court ruled that there were no policy reasons for excepting co-conspirator declarations from the *Roberts* rule. It held that the Confrontation Clause required the government to make a good faith effort to produce the declarant "before availing itself of [the] tremendous evidentiary advantage" of seeking and obtaining convictions on the basis of testimony not subject to cross-examination. (Pet. App. 13a.)

The court then set forth three alternative ways in which the government might make the requisite minimal showing (none of which was pursued by the government at the trial of this case): demonstration of a good faith effort on the part of the government to secure the wit-

ness' attendance at trial; production of the witness to invoke a claim of privilege; or production of a record, such as an affidavit from the declarant, which establishes both that he will claim the privilege and that requiring his actual appearance would be a meaningless formality. (Pet. App. 15a 16a, 18a.)

The government petitioned for rehearing, challenging the holding of the court and urging in the alternative, for the first time, that the proper remedy was a remand for a hearing on Lazaro's unavailability rather than a new trial. The petition for rehearing was denied.

SUMMARY OF ARGUMENT

I.

The Confrontation Clause provides that: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." It is designed to protect an accused individual from conviction on the basis of out-of-court statements, without benefit of cross-examination.

In this case, the government used out-of-court declarations, admissible in evidence under Fed.R.Evid. 801 (d)(2)(E), to obtain a conviction. The issue here is whether the Confrontation Clause affords protection to a defendant against whom such declarations are introduced. The narrow question is whether the government was obliged by the Constitution to either produce the declarant for cross-examination or demonstrate his unavailability before making use of his declarations.

A. Many commentators trace the origin of the right to confrontation to the trial of Sir Walter Raleigh. Raleigh was tried and convicted on the basis of the deposition of one Cobham, who was never called as a witness. It was apparently in response to Raleigh's conviction the right of confrontation developed in English law. 1 J. Stephen, *A History of the Criminal Law of England* 333-336 (1883). At the trial below, John Lazaro, through the tape recordings introduced into evidence, was a critical witness against respondent, just as the deponent Cobham, through the depositions introduced at trial, was a witness against Sir Walter Raleigh.

The earliest history of the right of confrontation, discussed at length by the government, does not lead to the conclusion it seeks—that hearsay exceptions, including the exemption for co-conspirator declarations, should be viewed as immune from Confrontation Clause scrutiny. While the earliest history of the Clause does not provide the answer to today's question, it provides useful guidance: it is clear from that history that the right of confrontation, which was seen as a protection of the right of cross-examination as well, was considered one of the fundamental aspects of a fair trial.

B. The scope and meaning of the confrontation right is apparent from the decisions of this Court. The Court has developed a rule of necessity in cases construing the Confrontation Clause:

> "The Confrontation Clause operates in two separate ways to restrict the range of admissible hearsay. First, in conformance with the Framers' preference for face-to-face accusation, the Sixth Amendment es-

tablishes a rule of necessity. In the usual case (including cases where prior cross-examination has occurred), the prosecution must either produce, or demonstrate the unavailability of, the declarent whose statement it wishes to use against the defendant. See *Mancusi v. Stubbs,* 408 U.S. 204 (1972); *Barber v. Page,* 390 U.S. 719 (1968). See also *Motes v. United States,* 178 U.S. 458 (1900); *California v. Green,* 399 U.S. at 161-162, 165, 167, n. 16."

Ohio v. Roberts, 448 U.S. 56, 65 (1980).

Additionally, the Court said, an inquiry into the reliability of the offered statement is required "once a witness is shown to be unavailable." (*Id.*) With regard to statements falling within a traditional hearsay exception, the Court noted that reliability can often be inferred without more. (*Id.* at 66.)

The rule of necessity is not new. On the contrary, in *Ohio v. Roberts* the Court described the two-step approach that the Court has adopted in its past Confrontation Clause cases as reflecting "the Framers' preference for face-to-face accusation". Although the government argues that the *Roberts* statement of the rule of unavailability is limited to former testimony cases, the Court there indicated just the opposite by stating that the rule applies generally, "including [in] cases where prior examination has occurred." 448 U.S. at 65.

By its terms, the Court's rule of unavailability applies to all out-of-court declarations, whether or not they fall within traditional hearsay exceptions. However, the Court there noted that in certain cases, where the utility of cross-examination is sufficiently remote, the government's failure to produce a witness or show his unavailability may be harmless error.

C. The specific statements at issue here were admitted under the exemption to the hearsay bar for co-conspirator statements. This exemption rests on the fiction that each co-conspirator is an agent of every other co-conspirator. In our adversarial system of justice, admissions are admissible against a party, though they may be hearsay. By extension, admissions of agents or servants are admissible against the principal or master, and by further extension, co-conspirator statements are admissible against an accused other co-conspirator.

Admissibility of these statements, unlike those admitted under Rule 803 and similar state-law exceptions, is entirely unrelated to the likely reliability of the statements. Statements admissible under Rule 801 (d)(2)(E) are often without any hint of reliability. Such declarations will meet the rule's requirements despite the fact that they contain falsehoods: "Many statements actually in furtherance of an alleged conspiracy will be quite unreliable in whole or in part." Davenport, *The Confrontation Clause and the Co-Conspirator Exception in Criminal Prosecutions: A Functional Analysis,* 85 Harv. L. Rev. 1378, 1387 (1972).

D. The fact that most of the Confrontation Clause cases examined by this Court involved prior recorded testimony certainly does not lead to a conclusion that a

different result is warranted in cases involving co-conspirator declarations. Former testimony, although given under oath, in the presence of the defendant, and in fact subjected to cross-examination, is not admissible unless the government demonstrates that its admission is necessary because the declarant is unavailable. There is no justification for the government's assertion that co-conspirator declarations—declarations not made under oath, often not made in the presence of the defendant, never made subject to cross-examination, are not governed by the same clear rule.[2] The requirement of production or demonstration of the unavailability of the declarant applies to co-conspirator declarations with at least the force it has in application to cases involving prior testimony, which is more reliable than co-conspirator statements.

There is not a solitary statement identified by the government to support its remarkable contention that the Confrontation Clause decisions of this Court may be reduced to a rule applicable only to former testimony cases. So far as we are aware neither this Court nor any other court nor any commentator has ever read them in the way the government proposes.

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[2] We do not contend that the co-conspirator declarations are not admissible once the declarant is either called by the government as a witness or shown to be unavailable. In either case, the statements are admissible.

II.

The government urges the proposition that, even if this Court agrees that a good faith effort to produce a co-conspirator is a necessary predicate to the use of his out-of-court declarations, the court of appeals "erred in ordering a new trial without giving the government an opportunity on remand to prove unavailability." (Govt. Br. 44.) On this record, it is clear that there are two reasons for determining that the court of appeals did not err: the government *had and declined* its opportunity in the trial court to prove unavailability or produce the declarant; and a hearing more than two years after the trial would be useless for determination of availability *vel non* at trial.

ARGUMENT

I. THE CONFRONTATION CLAUSE REQUIRES THAT THE GOVERNMENT MAKE A GOOD FAITH EFFORT TO PRODUCE A CO-CONSPIRATOR WHOSE DECLARATIONS IT SEEKS TO USE AT TRIAL

A. The Government's Historical Analysis Is Unfounded And Provides No Basis For Its Effort To Place Co-conspirator Declarations Wholly Beyond The Reach Of The Confrontation Clause

The government opens its argument in this case with a lengthy historical review designed to show that when the Confrontation Clause was adopted it was understood that it had no role to play in cases involving "the admission of out-of-court statements falling within exceptions

to the hearsay rule." But none of the historical sources relied upon by the government says as much. Hale and Blackstone did not discuss co-conspirator hearsay, and for purposes of disposition of this case it seems to us inconclusive, to say the least, to assert that they discused the right of confrontation and the hearsay rules on different pages of their treatises, without addressing whether and under what circumstances an available hearsay declarant should be called to testify. And the early recognition that dying declarations could come in without affront to state confrontation clauses is inconclusive as well, since so far as appears the decisions cited by the government all involved declarations of witnesses who were dead and hence unavailable. Those decisions, then, do not establish a historical acceptance of all hearsay exceptions regardless of the availability of the witness.

The government seeks to explain the absence of any square support for its view—that statements admissible as exceptions to the hearsay rule are immune from Confrontation Clause scrutiny—in the writings of "the jurists and scholars of the 18th and early 19th centuries" (Govt. Br. 23) by arguing that the issue was too obvious to warrant comment. According to the government, it was clear that the Confrontation Clause was meant to bar evidence in the form of affidavits or depositions obtained by the prosecution *ex parte*, but to allow evidence falling within traditional exceptions, because the latter carry with them certain independent indicia of reliability that could not be said to characterize affidavits and depositions. But whatever force that argument may have with respect to hearsay exceptions that have arisen on the basis of judgments about the trustworthiness of the out-of-court state-

ments, the government ignores the fact that it has no bearing on the co-conspirator hearsay exemption whose history, as we show later, demonstrates that it is rooted in considerations other than reliability or trustworthiness.

In short, we believe that the government's historical exegesis is simply wrong in suggesting that the issue in this case was resolved in its favor in 1787, and that the course of history has run sure-footedly ever since toward a reversal here on the "sudden epiphany" (Govt. Br. 8) of the court below. Justice Harlan, concurring in *California v. Green*, 399 U.S. 149, 173-4 (1970), noted that "the Confrontation Clause comes to us on faded parchment," and that "[h]istory seems to give us very little insight into the intended scope of the Sixth Amendment Confrontation Clause."[3] And in *Ohio v. Roberts*, 448 U.S. 56, 66 n.9 (1980), the Court noted that "[t]he complexity of reconciling the Confrontation Clause and the hearsay rules has triggered an outpouring of scholarly commentary" vouching for widely different, even contradictory approaches and having in common only a declared fidelity to historical accuracy.

The government's review gives short shrift to the discussion of the historical function of the right of confrontation which does emerge from the old sources. While Hale's characterization of confrontation as affording "great opportunities . . . for the true and clear discovery of the truth" is quoted (Govt. Br. 15-16), the government

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[3] See also *Dutton v. Evans*, 440 U.S. 74, 95 (1970) (Harlan, J., concurring) ("It is common ground that the historical understanding of the clause furnishes no solid guide to adjudication.").

fails to take into account the method by which confrontation of witnesses leads to determination of the truth. In an earlier edition, after the section quoted by the government in its brief, Hale explains the method:

> "The very quality, carriage, age, condition, education, and place of commorance of witnesses, is by this means plainly and evidently set forth to the court and the jury, whereby the judge and jurors may have full information of them, and the jurors as they see cause may give the more or less credit to their testimony, for the jurors are not only judges of the fact, but many times of the truth of evidence; and if there be just cause to disbelieve what a witness swears, they are not bound to give their verdict according to the evidence or testimony of that witness. . . ."
>
> M. Hale, *The History of the Common Law of England*, 255-56 (2d ed. 1716).

The government's characterization of Blackstone's *Commentaries* as containing no reference to confrontation rights in its discussion of hearsay is incorrect, perhaps because of a misreading of the language cited in its brief at page 16 (the emphasized portion was omitted from the government's quote):

> "[N]o evidence of a discourse with another will be admitted, but the man himself must be produced; yet in some cases (as in proof of any general customs or matters of common tradition or repute) the courts admit of hearsay evidence, *or an account of what persons deceased have declared in their lifetime: but such evidence will not be received for any particular facts.*"
>
> 3 W. Blackstone, *Commentaries on the Law of England*, 368 (1768) (emphasis added).

That statement of the rule against receipt of hearsay for the truth of the matter asserted follows immediately an analysis of the requirement of live testimony:

> "[T]he one general rule that runs through all the doctrine of trials is this, that the best evidence the nature of the case will admit of shall always be required, if possible to be had; but, if not possible, then the best evidence that can be had shall be allowed."
>
> *Id.*

That general rule, when applied in the specific context of a criminal case, implicates the confrontation rights discussed at pages 373-374 of the *Commentaries* and quoted in the government's brief at pages 16-17. In a criminal context, this Court has long recognized that the confrontation clause protects the "general rule" which Blackstone describes as requiring the "best evidence". Thus, a criminal defendant is guaranteed the opportunity "of compelling [the witness] to stand face to face with the jury in order that they may look at him and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." *Mattox v. United States, supra,* at 242-243.

The relevant history offers no support for the government's notion that "traditional hearsay exceptions . . . should be regarded as presumptively valid" (Govt. Br. 24).[4] Indeed, it is clear that acceptance of the government's notion of "presumptive validity", if it is meant to preclude Confrontation Clause analysis of any hearsay exception established in the law of evidence, would achieve

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[4] Nor does history support the extension of such a notion, even if the Court were to accept its application to hearsay exceptions, to co-conspirator declarations.

what the government is at pains to deplore, namely the constitutionalization of those very exceptions by annointing them all as untouchable under the Confrontation Clause. Moreover, the "presumptive validity" concept, if it is meant to be an *in limine* yet dispositive answer to cases such as this one, is contrary to the case-by-case approach that this Court has followed over the years and has ruled is the correct approach. *Ohio v. Roberts,* 448 U.S. 56 (1980).

This case arises in the context of the role of confrontation to insure the "true and clear discovery of the truth". Hale, at 255. The history that is relevant to its disposition, and to which we now turn, is to be found in the development of the co-conspirator declaration's exemption from the bar against hearsay and in this Court's Confrontation Clause decisions.

B. Admission Of Co-conspirator Declarations Is Not Based On A Theory Of Reliability Which Might Justify Their Removal From Confrontation Clause Scrutiny

This Court's adoption of the rule providing for admission of co-conspirator statements is most often traced to *United States v. Gooding,* 25 U.S. (12 Wheat) 459 (1827). In that case, which concerned the use of statements made by the captain of a ship in the ship-owner's trial, the issue before the Court was admission of statements of an agent against the principal. The Court noted that its rule was also applicable to conspiracy where "once the conspiracy or combination is established the act of one conspirator, in the prosecution of the enterprise, is considered the act of all, and is evidence against all. Each is deemed to consent to, or command, what is done by any other in furtherance of the common object." *Id.,* 469. As is apparent, the rationale for admission of evidence concerning co-conspirators is that of agency. Subsequent cases, including those cited by the government at 34-35 of its brief, elaborated on the discussion in *Gooding* and applied it specifically to declarations of co-conspirators as well as to their acts. *See, e.g., American Fur Co. v. United States,* 27 U.S. (2 Pet.) 358 (1829) ("where two or more persons are associated together for the same illegal purpose, any act or *declaration* of one of the parties, in reference to the common object, . . . may be given in evidence against the others". *Id.* 365) (emphasis added); *Lincoln v. Claflin,* 74 U.S. (7 Wall.) 132 (1868) ("The *declarations* of each defendant, relating to the transaction under consideration, were evidence against the other, . . . if the two were engaged at the time in the furtherance of a common design." *Id.* 139) (emphasis added). The reasoning in each instance proceeds from the notion that each co-conspirator is the agent of every other co-conspirator.

The exemption for co-conspirator statements recognized by the Court in *Gooding* and *American Fur Co.* was included in the Federal Rules of Evidence in Rule 801(d) (2) (E), which provides in relevant portion that:

> A statement is not hearsay if—
>
> . . .
>
> (2) . . . The statement is offered against a party and is . . . (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

The rule imposes three separate conditions on admissibility of a statement: that it be made by a co-conspira-

tor; that it be made during the course of the conspiracy and that it be made in furtherance of the conspiracy. The rule does not impose a requirement that the statement be reliable or trustworthy.

Structurally, the rule is embedded in the general exemption for admissions of a party opponent, Fed.R.Evid. 801(d) (2). It follows the specific exemptions for statements adopted by the party, Fed.R.Evid. 801(d) (2) (B), statements made pursuant to authorization provided by a party, Fed.R.Evid. 801(d) (2) (C), and statements made by an agent or a servant concerning a matter within the scope of his duties made during the course of his employment, Fed.R.Evid. 801(d) (2) (D).

The history of the co-conspirator exemption, its formulation, and its placement demonstrate that admissibility of co-conspirator statements is not based on their inherent reliability or trustworthiness. Indeed, "[n]o guarantee of trustworthiness is required in the case of admissions." Advisory Committee Note to Fed.R.Evid. 801(d) (2).

Commentators and courts have recognized that statements admissible under Rule 801(d) (2) (E) are often without any hint of reliability. Statements will meet the rule's requirements despite the fact that they contain falsehoods:

> "A statement may actually further a conspiracy simply by being plausible to its audience, which means that it may well fit within the circumstances *without being true*, and such a statement may appear to satisfy very well both the furtherance and the independent evidence requirements."

Mueller, *The Federal Coconspirator Exception: Action, Assertion, and Hearsay*, 12 Hofstra L. Rev. 323, 357 (1984)

(emphasis added). *See also* Davenport, *supra*, at 1387 ("Many statements actually in furtherance of an alleged conspiracy will be quite unreliable in whole or in part.").

Circuit courts have recognized that statements wholly unreliable from the point of view of the truth of the representations therein are admissible as co-conspirator declarations. For instance, "[p]uffing, boasts, and other conversation" are deemed to be in furtherance of a conspiracy when they are used "to obtain the confidence of one involved in the conspiracy". *United States v. Miller*, 664 F.2d 94, 98 (5th Cir. 1981), *cert. denied*, 103 S.Ct. 121 (1982). And inaccurate recitations of past fact are admissible when they are "[s]tatements between conspirators which provide reassurance [and] serve to maintain trust and cohesiveness among them." *United States v. Ammar*, 714 F. 2d 238, 252 (3rd Cir.), *cert. denied*, 464 U.S. 936 (1983).

Statements admissible under Fed.R.Evid. 801(d) (2) (E) may include deliberately deceptive statements between co-conspirators. There is no analytical reason to assume that such statements would be truthful or accurate or that they are within that class of statements for which reliability may be inferred.

The government's brief fails to take note of the differences—in terms of bases for inferring reliability—between Rule 801(d) (2) (E) and Rule 803.[5] Co-conspirator

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[5] Rule 804's exceptions are premised on the unavailability of the declarant. While the Confrontation Clause may still impose significant constraints in these circumstances, see *Pointer v. Texas*, 380 U.S. 400 (1965) (requiring an adequate opportunity for prior cross-examination for admission of former testimony even where there is no dispute about the witness' unavailability), the constitutional requirement of unavailability is invariably met.

statements and hearsay exceptions are classified separately in the federal rules. This separation reflects the significant theoretical distinction between co-conspirator statements and other hearsay exceptions.

C. The Court's Confrontation Clause Decisions Establish A Rule Of Unavailability For The Government's Use Of Out-Of-Court Declarations

The Confrontation Clause provides that: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . ." It is designed to protect a person accused of crime from conviction on the basis of out-of-court testimony without benefit of cross-examination.

The government argues that the Court's decisions under the Confrontation Clause fall into three neat categories: it says that the Court subjects to "close regulation" the admission of hearsay which is "broadly analogous to an affidavit or deposition"; that other hearsay exceptions are not subject to "the same close regulation"; and "the Court has held out the possibility of closer examination of any new and radical departures from traditional hearsay rules." (Govt. Br. 25.)

We are not sure what it means to decide Confrontation Clause cases according to norms of "close regulation", not-so-close regulation, or possibilities of "closer examination". And, so far as we are aware, no decision of this Court, or of any lower court, and no commentator has adopted or even perceived the tripartite approach urged by the government. Moreover, the case cited for the proposition that "new and radical departures" fall into the third defined camp of cases, where the Court is said to have "left open the possibility" of application of "stricter standards" (Govt. Br. 31), involved the admission of evidence "under a long-established and well-recognized rule of state law" (400 U.S. at 83) that was "hardly unique" and "was recognized in *Krulewitch* [*v. United*

States, 336 U.S. 400 (1949)]". *Dutton v. Evans,* 400 U.S. 74, 83 & n. 15 (1970).

Our view is that the best indication of this Court's approach to Confrontation Clause cases is to be found in the Court's own description, given in *Ohio v. Roberts.* That case involved the admissibility at the defendant's trial of the transcript of testimony given at a preliminary hearing by a witness called and questioned by defense counsel. After a careful review of its earlier decisions under the Confrontation Clause, the Court noted that "a general approach is discernible" (448 U.S. at 65), which it then set forth:

> "The Confrontation Clause operates in two separate ways to restrict the range of admissible hearsay. First, in conformance with the Framers' preference for face-to-face accusation, the Sixth Amendment establishes a rule of necessity. In the usual case (including cases where prior cross-examination has occurred), the prosecution must either produce, or demonstrate the unavailability of, the declarant whose satement it wishes to use against the defendant. See *Mancusi v. Stubbs,* 408 U.S. 204 (1972); *Barber v. Page,* 390 U.S. 719 (1968). *See also Motes v. United States,* 178 U.S. 458 (1900); *California v. Green,* 399 U.S. at 161-162, 165, 167, n. 16."
>
> *Id.* (Footnote omitted but discussed below at note 6).

And second, said the Court, an inquiry into the reliability of the offered statement is required "once a witness is shown to be unavailable." (*Id.*) With regard to statements falling within a traditional hearsay exception, the Court noted that reliability can often be inferred without more. (*Id.* at 66.)

By its terms, the *Roberts* rule of unavailability applies to all out-of-court declarations, whether or not they fall within traditional hearsay exceptions. The Court there noted, however, that the threshold requirement of production of the declarant or demonstration of unavailability need not always be met.[6] (The second inquiry, into reliability of the out-of-court declaration, will often be satisfied by a showing that the declaration is within a traditional exception to the rule against hearsay.[7])

This Court's recognition of an established "rule of necessity" requiring the prosecutor "to demonstrate the unavailability of" an unproduced declarant, far from being an "off-hand" embrace of "a revolutionary proposition" (Govt. Br. 27), was one which was supported by the decisions relied on by this Court and one which the Court returned to and repeated, saying, "In sum, when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable." (*Id.* 66.)

[6] The *Roberts* Court observed in a footnote that in *Dutton v. Evans*, 400 U.S. 74 (1970), "the Court found the utility of trial confrontation so remote that it did not require the prosecution to produce a seemingly available witness." 448 U.S. at 65 n. 7. The result in *Dutton* reflected no judgment by the Court that co-conspirator hearsay by its nature was immune from the availability requirement, but rather a practical, essentially harmless error analysis based on the fact that the hearsay in that case came in through brief testimony, "of peripheral significance at most", of one of twenty witnesses who testified for the prosecution. 400 U.S. at 74. The *Dutton* exception has no relevance to this case, where, as the court below noted, the recorded conversations constituted "[t]he linchpins of the government's case" (Pet. App. 4a) and the government accordingly made no argument to the Court below that the testimony of Lazaro was of peripheral significance or that cross-examination of him would have had no utility.

[7] The Court has declined in the past to decide—and need not decide in today's case—on whether the inferred reliability of statements within certain "firmly rooted" exceptions to the hearsay rule may warrant relaxation of or dispensing with the rule of unavailability. *See, e.g., Ohio v. Roberts*, 448 U.S. at 66 & n. 8 (1980); *California v. Green*, 399 U.S. 149, 155 (1970). *Bruton v. United States*, 391 U.S. 123, 128-9 & n. 3 (1968).

As the Court noted, the rule of necessity finds explicit support as far back as 1900. In *Motes v. United States*, 178 U.S. 458 (1900), a co-conspirator confessed and implicated the defendants at a preliminary hearing where he was cross-examined by defense counsel. The co-conspirator thereafter escaped before trial, and at trial his confession, reduced to writing, was introduced, as was testimony about the confession from several officials who had attended the preliminary hearing. The Court held that the statements were admitted "in violation of the constitutional right of the defendants to be confronted with the witnesses against them," notwithstanding their prior opportunity for cross-examination, because the unavailability of the witness at trial "was manifestly due to the negligence of the officers of the Government." (*Id.* 471; *see also id.* 474.)

The unavailability rule was foreshadowed in decisions of this Court even earlier than *Motes*. In *Mattox v. United States*, 156 U.S. 237 (1895), during a homicide prosecution the government introduced the testimony of two witnesses who had testified at a former trial and who had since died. At the former trial they had been cross-examined. The Court reviewed the authorities and concluded that "the right of cross examination having once been exercised, it was no hardship on the defendant to allow the testimony of the deceased witness to be read."

The Court also, in dictum, vouched for the admissibility of dying declarations under the Confrontation Clause. Even in that circumstance, it was clear that the unavailability of the witnesses was assumed to be a predicate for the admission of the declaration. Thus the Court said, presaging *Ohio v. Roberts*, that "*the necessities of the case*" justified the admission of such declarations "because made by a person then dead." *Mattox v. United States*, 156 U.S. at 244 (emphasis added.)

Pointer v. Texas, 380 U.S. 400 (1965) makes clear that the right secured by the Confrontation Clause is not simply the right to face one's accuser in court. The victim of a robbery, Phillips, testified at Pointer's preliminary hearing. Pointer was present, but was not represented by counsel and did not cross-examine Phillips. Phillips did not appear at the trial and his preliminary hearing testimony was introduced against Pointer. The Court reversed Pointer's conviction, holding that his rights under the Confrontation Clause had been violated. The Court stated:

> "It cannot seriously be doubted at this late date that the right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him. And probably no one, certainly no one experienced in the trial of lawsuits, would deny the value of cross-examination in exposing falsehood and bringing out the truth in the trial of a criminal case. See, e.g., 5 Wigmore, Evidence, Section 1367 (3d ed. 1940)."

Id. 404. Later, the Court continued:

> "Under this Court's prior decisions, the Sixth Amendment's guarantee of confrontation and cross-examination was unquestionably denied petitioner in this case. As has been pointed out, a major reason underlying the constitutional confrontation rule is to give a defendant charged with crime an opportunity to cross-examine the witnesses against him."

Id. 406-07 (citations omitted). Thus, the Court recognized that the Confrontation Clause embodies the right to cross-examine witnesses.

The Court's Confrontation Clause analyses in decisions after *Mattox* and *Motes* demonstrate the continuity between those early decisions and the *Ohio v. Roberts* rule of necessity. For instance, in *California v. Green*, 399 U.S. 149 (1970), the Court faced a Confrontation Clause challenge to the substantive use at trial of prior inconsistent testimony of a witness who appeared at trial and whose earlier testimony had been subject to cross-examination. The former testimony was admitted pursuant to a state rule of evidence, but this Court explained that admissibility under rules of evidence did not establish constitutionality under the Confrontation Clause (*id.* 155):

> "Our decisions have never established such a congruence; indeed, we have more than once found a violation of confrontation values even though the statements in issue were admitted under an arguably recognized hearsay exception. See *Barber v. Page*, 390 U.S. 719 (1969); *Pointer v. Texas*, 380 U.S. 400 (1965)."

The Court upheld the admission of the former testimony, since the declarant had actually appeared at trial. It said that its previous Confrontation Clause cases do not "require excluding the out-of-court statements of a witness who is available and testifies," but instead mostly dealt with the opposite situation, in which the declarant was unavailable "despite good-faith efforts of the State." *Id.* 161.

The Court also held that the witness' statements in that case were admissible because they had been subject to cross-examination at the earlier hearing, but in so doing squarely recognized the unavailability rule: "[The witness] Porter's statement would, we think, have been admissible at trial even if Porter had been actually unavailable, despite good-faith efforts of the State to produce him." (*Id.* 165.) And again: "If Porter had died or was otherwise unavailable, the Confrontation Clause would not have been violated by admitting his testimony at the preliminary hearing" because the right of cross examination afforded at that hearing provided "substantial compliance with the purposes behind the confrontation requirement, as long as the declarant's inability to give live testimony is in no way the fault of the State." *Id.* 166.[8]

Similarly, in *Barber v. Page,* 390 U.S. 719 (1969), where the state introduced out-of-court statements of a declarant who was jailed in a nearby state, the rule of unavailability was assumed and the question was whether the declarant's incarceration satisfied it. The Court held not: "In short, a witness is not 'unavaliable' for the purposes of the foregoing exception to the confrontation re-

[8] Indeed, the Court's understanding that good faith efforts by the government to produce the declarant are a precondition to the admission of the declarant's out-of-court statements permeates the entire decision. In addition to the examples already noted, see *id.* 167 ("The State here has made every effort"); 167 n. 16 ("necessity" exists when a witness is unavailable because of the State's 'need' to introduce relevant evidence that through no fault of its own cannot be introduced in any other way"); and *id.* ("As long as the State has made a good faith effort to produce the witness, the actual presence or absence of the witness cannot be constitutionally relevant for purposes of the 'unavailability' exception.")

quirement unless the prosecutorial authorities have made a good faith effort to obtain his presence at trial." *Id.* 724-725. The Court also ruled that, even if the statements that were introduced had been subject to cross-examination at the time they were made, they would nonetheless have been inadmissible under the Confrontation Clause "unless the witness is shown to be actually unavailable" at trial. *Id.* 725-726.

Mancusi v. Stubbs, 408 U.S. 204 (1972), is the same. There the initial question was whether the declarant's out-of-court statements were admissible under the Confrontation Clause on the ground that the declarant, who by the time of trial resided in Sweden, was unavailable. Following precisely the two-part analysis later said to be the hallmark of the Court's Confrontation Clause cases in *Ohio v. Roberts,* the Court first determined that the declarant was actually unavailable, the State having been "powerless to compel his attendance" at the trial, *id.* 212, and then turned to the question of reliability: "It is clear . . . from numerous prior decisions of this Court, that even though the witness be unavailable his prior testimony must bear some . . . 'indicia of reliability' . . . ." *Id.* 213 (citations omitted).

In the face of this longstanding, consistent string of harmonious rulings from this Court establishing a rule of unavailability, there is simply no merit to the government's position that the holding of the court below—which is absolutely faithful to these decisions—marks a sudden, erratic departure from Confrontation Clause jurispru-

dence. The government supports its view in that regard and seeks to deal with all of these decisions, by saying that they "must have been intended to describe only the exception for former testimony." (Govt. Br. 26.)

There is not a solitary statement in any of those decisions (and the government identifies none) to support the remarkable view that the Confrontation Clause decisions of this Court boil down to a rule applicable only to former testimony cases, and so far as we are aware neither this Court nor any other court nor any commentator has ever read them in the way the government proposes.[9] On

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[9] Indeed, one commentator, cited with approval in *Ohio v. Roberts* (albeit for other reasons), has taken the contrary view:

> "The rules formulated above [for assessing reliability] should not be applied to justify a failure by the prosecustor to call an available declarant. Those rules are at best inferior substitutes for cross examination of the actual declarant and should be resorted to only where the declarant is in fact unavailable to testify. As the Supreme Court has indicated several times, the confrontation clause should require the prosecutor to make a good faith effort to produce the literal accuser. Thus: *Rule IV—Co-Conspirator hearsay is not admissible until the prosecution has made an affirmative showing that the declarant is unavailable.*"

Davenport, *The Confrontation Clause and the Co-conspirator Exception in Criminal Prosecutions: A Functional Analysis*, 85 HARV. L. REV. 1378, 1403 (1972) (citations omitted, emphasis in original).

the contrary, in *Ohio v. Roberts* the Court described the two-step approach that the Court has adopted in its past Confrontation Clause cases as reflecting "the Framers' preference for face-to-face accusation", and its statement of the rule of unavailability, far from being limited to former testimony cases, indicated just the opposite by stating that the rule applies generally, "including [in] cases where prior examination has occurred." 448 U.S. at 65.

In short, the history of the Confrontation Clause jurisprudence that is relevant to this case, found in an unbroken line of decisions of this Court spanning at least 85 years, sides with us and warrants affirmance of the decision below since the prosecution "[n]either produce[d], [n]or demonstate[d] the unavailability of, the declarant whose statement is . . . use[d] against the defendant." *Ohio v. Roberts*, 448 U.S. at 65.

The fact that most of the Confrontation Clause cases examined by this Court involved prior recorded testimony certainly does not lead to a conclusion that a different result is warranted in cases involving co-conspirator declarations—declarations not made under oath, often not made in the presence of the defendant, never made subject to cross-examination. Surely such declarations, if used against a defendant, must be attended by at least the safe-

guards required for the government's use at trial of former testimony.

D. The Rationale And Purpose Of This Court's Rule Of Unavailability Apply To Co-conspirator Declaration Cases

Initially, we highlight the fundamentally simple rules emerging from this Court's holdings which are omitted from the government's analysis: the Court's rule of necessity applies to all out-of-court declarations; where the utility of cross examination is sufficiently remote, the government's failure to produce a declarant or to demonstrate his unavailability may be harmless error; when the out-of-court declaration falls within a traditional hearsay exception, reliability may be inferred.

The Confrontation Clause and the hearsay bar are not congruent, but do spring from the same roots. Their common source is a concern for the reliability of the evidence put before a fact-finder. The exceptions to the hearsay rule reflect a concern for rules which do not unduly hinder the fact-finder's access to reliable evidence.[10] Their roots are different from the source of the rule which permits receipt of co-conspirator declarations.

The exemption for co-conspirator declarations does not arise from judgments about trustworthiness of certain sorts of out-of-court declarations. It is justified by the adversary system and by the "fiction" that a co-conspirator speaks for all members of the conspiracy as an agent

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[10] It is this concern which explains this Court's willingness to infer reliability in most traditional exceptions to the hearsay rule.

speaks for a principal. That fiction is grounded in a notion quite distinct from truthfuiness or reliability of evidence.

We consider next what follows from application of these rules to this case. Clearly, the Confrontation Clause originally developed as a protection against trial by affidavit or deposition:

> [T]he particular vice that gave impetus to the confrontation claim was the practice of trying defendants on "evidence" which consisted solely of ex parte affidavits or depositions . . . thus denying the defendant the opportunity to challenge his accuser in a face-to-face encounter in front of the trier of fact. . . . The proof was usually given by reading depositions, confessions of accomplices, letters and the like. . . .

California v. Green, 399 U.S. at 156-57 (quoting 1 J. Stephen, *A History of the Criminal Law of England* 326 (1883)).

The protection extends to the government's use of former testimony. The defendant may not be deprived of the right to confront and cross-examine the witnesses against him unless resort to that testimony is *necessary*. Use of former testimony denies a defendant the opportunity

> "not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief."

Mattox, 156 U.S. at 242-43.

This is so, as a matter of constitutional law, even though in the case of former testimony a defendant may

have had the opportunity to physically confront the witness in court and the witness testified under oath and was subjected to cross-examination. These features of prior confrontation distinguish former testimony from affidavits or depositions.[11] They insure some protection to the rights secured by the Confrontation Clause, but do not excuse the government from its obligation to produce the witness or demonstrate his unavailability.

By contrast with former testimony, co-conspirator statements are not made in court under oath and subject to cross-examination. While they may be made in the presence of the defendant, they need not be. The use of such statements at trial without confrontation imperils precisely the same values as does the use of former testimony, but offers far less protection. There is no comprehensible reason why, in such a case, the government should be excused from its burden of producing an available witness.[12] If, as is clearly the case, previously recorded testi-

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[11] Former testimony is preferable to affidavits and depositions in this regard since at least a defendant may have once had an opportunity to confront and cross-examine the witness against him. In recognition of this, former testimony may be admissible, despite the denial of trial confrontation, where the witness is shown to be unavailable. By contrast, depositions and affidavits cannot be used in a criminal trial, even though the witness may be unavailable. See *Bruton v. United States*, 391 U.S. 123 (1968); *Douglas v. Alabama*, 380 U.S. 415 (1965).

[12] Adoption of the government's position could lead to anomalous results. If, at a first trial, a co-conspirator were called to testify and did testify, and if a new trial were ordered, at the second trial, absent a showing of unavailability, the government could not use the prior testimony, despite the fact that the defendant may have vigorously cross-examined the witness. The government could, however, use out-of-court statements, unsworn and not subject to cross-examination.

mony may not be introduced unless the declarant is unavailable, it seems to us *a fortiori* that the same rule must apply to co-conspirator statements.

As we see it, the government offers three reasons in support of its view that the unavailability requirement should not apply in co-conspirator declaration cases: (1) co-conspirator declarations are meaningfully different from prior recorded testimony in that the latter is an inferior substitute for live testimony, whereas co-conspirator declarations carry their own saving independent probative value; (2) if an exception is not announced in this case, the Court will necessarily have to decide the same issue with respect to all the exceptions to the hearsay rule set forth at Rule 803; and (3) an affirmance here would have a calamitous effect on the government's ability to prosecute conspiracy cases.

The government's first reason for arguing that the rule of necessity should not apply in co-conspirator cases —that the *Roberts* rule is designed for only former testimony situations—is fundamentally in error and rests on an incorrect and narrow view of the purposes of the Confrontation Clause. Cases involving the admission of prior recorded testimony, the government repeatedly says, properly require application of the rule of unavailability because prior recorded testimony is like affidavits or depositions.

Though never explicitly stating the ways in which former testimony is comparable to affidavits or depositions, the government refers to several "critical respects" which it claims are relevant. (Govt. Br. 25.) These critical respects apparently are that affidavits and depositions can be detailed and comprehensive, can be crafted to make out all elements of the charge against the defendant, are created with litigation in mind and are therefore subject to distortion, and are created in the presence of and under the potential influence of one of the parties. (Govt. Br. 24.)

It may be true that affidavits, depositions and former testimony are similar in those respects. However, the government omits the most crucial features of confrontation from its list of "critical respects." It was the absence of these features from depositions and affidavits that was most objectionable to the early creators of the right to confront witnesses.

The government characterizes "evidence falling within other traditional hearsay exceptions," as having "probative value very different from subsequent live testimony" and says that such evidence does not require as a predicate for its admissibility a showing of the unavailability of the declarant. That evidence is distinguished from former

testimony, which it describes as a "next-best substitute."[13] (*Id.* at 9. See also *id.* at 23, 27.) It is correct that some out-of-court statements may have independent probative value. Thus, a jurisdiction may, as an evidentiary matter, choose to admit them into evidence for their own merit, even where the declarant is available. Yet this neither logically compels nor justifies their exclusion from the realm of evidence subject to the Confrontation Clause.

The government's position—assenting to an unavailability requirement for prior testimony but not for cases involving hearsay historically judged to be reliable (Govt. Br. 28)—is inappropriately taken in this case. Assuming *arguendo* that considerations of reliability should bear on the rule of unavailability, that question is not before the Court in this case: whatever the merits of its argument with respect to the exceptions to the hearsay rule codified in Federal Rule of Evidence 803, exceptions which we admit to be based on judgments about reliability, the government's position is wholly without substance in cases, such as this one, involving co-conspirator declarations.

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[13] Former testimony is said to be a "next-best substitute" because ordinarily it adds nothing to the live testimony offered in court and before the jury. If the witness has testified consistently before the jury, admission of the former testimony would add nothing that could aid the jury in its deliberations. It simply restates the live testimony, without allowing the jury the opportunity to assess the witness. If the witness has testified inconsistently, or if the earlier testimony was offered before a motive to fabricate arose, the former testimony may add something to the jury's deliberations, and is often admissible. See Rule 801(d)(1).

For similar reasons, the government is wrong in its second argument, that an affirmance in this case would necessarily mean that 23 of the exceptions recognized in Rule 803 without regard to availability "contravene the Confrontation Clause" (Govt. Br. 27), or anyway would introduce the camel's nose into the tent and require a "[c]lose reexamination of all the traditional hearsay exceptions under the Confrontation Clause." (*Id.* at 10) Those exceptions, the government says, "have been forged with full consideration of the very same fundamental concern that underlies the Confrontation Clause: what kind of evidence is too likely to mislead the finder of fact to permit its use at trial." (*Id.*) But as we have shown, the co-conspirator exception has *not* been forged with those considerations in mind. Thus the government cannot reasonably support its position by pointing out that "[i]n developing the proposed Rules of Evidence . . . the advisory committee carefully considered whether each of the hearsay exceptions possessed sufficient 'guarantee of trustworthiness'" (*Id.* at 34), since the rule they devised to govern the admissibility of co-conspirator statements was acknowledged, as we showed above, to have nothing to do with trustworthiness.

Accordingly, if, as we urge, the Court declines the government's invitation to dispense with the rule of unavailability in co-conspirator declaration cases, recognizing that that particular exemption from the hearsay bar does not carry with it the sort of indicia of reliability recognized for the exceptions listed in Rule 803, there need be no fear than an affirmance in this case will prejudge the constitutionality of any of the Rule 803 exceptions. This case does not involve any of those exceptions. There

will be time enough, in the appropriate case, to consider the government's argument that those exceptions are entitled to presumptions of validity based on their underlying and long-standing "psychological judgments about human behavior outside the courtroom." (*Id.* at 28.)

We come, finally, to the government's third argument, that an exception to the rule of unavailability is required for co-conspirator declarations because that kind of evidence is used "tens of thousands of times each year" (Govt. Br. 10-11); because the rule will burden the government, which in a single case may wish to introduce the out-of-court statements of "literally dozens of conspirators" (*id.* at 37); and because "[i]n many instances the declarant will not be identified by the prosecution" (*id.* at 39).

In our view that proves too much. The co-conspirator hearsay exemption is a formidable prosecutorial advantage—one given quite without regard to the reliability or trustworthiness of such declarations, and indeed in the teeth of the recognition that those declarations are in fact unreliable. That advantage is the very reason why it is used tens of thousands of times each year. And that is the very reason why the core values of the Confrontation Clause require that the declarant be produced if the government can do so with a good faith effort.

This Court has recently reaffirmed the Clause's "fundamental role in protecting the right of cross-examination" and that its "very mission" is to advance 'the accuracy of the truth-determining process in criminal trials.'" *Tennessee v. Street,* No. 83-2143 (May 13, 1985), slip op. 6,. quoting *Dutton v. Evans,* 400 U.S. at 89. It seems to us

that this truth-seeking goal would not be served by a rule that would allow the government, without any showing of a good faith effort to produce them, to seek and obtain convictions on the basis of out-of-court statements of dozens of individuals. The rule for which we contend—the requirement that the government produce or demonstrate the unavailability of the individuals whose out-of-court declarations are to be used against a defendant—is more in harmony than is the government's proposed rule with the long-recognized truth-protecting mission of the right of confrontation, to insure that

> "the persons who are to decide upon the evidence have an opportunity of observing the quality, age, education, understanding, behavior, and inclinations of the wi'ness. . . ."
>
> 3 W. Blackstone, *Commentaries on the Law of England* 374 (1768).

Moreover, the government's parade of burdens is vastly overstated, and in any event is wholly unrelated to the facts of the case now before the Court, where the prosecution used the out-of-court statements of four declarants aside from the defendant, all of whom were well known to the government and located in time for trial. The requirement that the government show a good faith effort to produce the declarant is itself straightforward and simple enough.[14] It may be that the requirement would become onerous as applied to dozens of out-of-court declarants in a single case, but as a practical matter we find

[14] The test of unavailability and on good-faith efforts is not unduly burdensome. *See, e.g., Ohio v. Roberts, supra* (witness was found to be unavailable where she was travelling in the United States and had not called her mother).

it hard to imagine the situation in which hearsay by the dozen would not be cumulative. Thus, the rule of unavailability is more likely simply to prompt the government to be selective in its choice of which declarations to use, rather than to "exact a grave toll on the resources of the criminal justice system." (Govt. Br. 36.)[15]

The government also opposes the unavailability rule on the asserted ground that many declarants, if called, would exercise their privilege not to testify. That, too, is a matter of some speculation. In many cases, the government itself may wish to call the declarants to testify—as it did in this case—and accordingly grant immunity to those declarants, which is likely to occur long before, and thus cause no disruption to, the trial. That is what happened here: The government introduced the out-of-court statements of McKeon and Mrs. Lazaro; and it called them to testify after having made immunity arrangements with them far in advance of trial. Beyond that, the court of appeals noted that in some circumstances the government could show its good faith efforts to produce through the simple procedure of presenting an affidavit from the declarant establishing that he would claim the privilege. (Pet. App. 18a.) And, finally, it bears repeating that these hardship claims by the government that the rule of unavailability will cause "considerable drain on available investigative and prosecutive resources" (Govt. Br. 42) amount to speculations and scary predictions that are not grounded in the facts of this case nor, apparently, in the

[15] And if, as the government suggests, the prosecution seeks to use the hearsay of a declarant who is incarcerated, the means for producing the declarant have long been readily available, as noted in *Barber v. Page, supra*.

government's experience during the last year in the Third Circuit (where the rule has been in effect since the decision below in November 1984) or in any other circuit where the rule has been held to apply and where, apparently, the government's ability to discharge its prosecutorial function has not been harmed.

The government claims additionally that the unavailability rule in co-conspirator declaration cases will not serve the truth-seeking goals of the Confrontation Clause because defense counsel will not wish to cross-examine any declarants that the government does produce or because declarants who do testify "would give evidence favorable to the prosecution." (Govt. Br. 43.) We are not so certain that testifying declarants would necessarily give evidence favorable to the government or that those who did would not be the subject of cross-examination by defendants. In the case here the defendant cross-examined both McKeon and Mrs. Lazaro at length and was prepared to cross-examine Mr. Lazaro had the government called him, as it repeatedly said it would. Certainly there is no reason to allow the government to defeat the unavailability rule on the basis of predictions that defendants would not wish to cross-examine the out-of-court declarants.

Finally, it seems to us worthwhile to put the government's claims of hardship in proper context under the Confrontation Clause. The government has presented hypothetical examples of geographically dispersed conspiracies involving dozens of conspirators acting over a period of years. Let us instead present a more simple example —the murder prosecution of a single defendant. In this example, the government presents only two witnesses at

trial: the coroner who testifies as to the manner of death, and one Allen, an unindicted co-conspirator. Allen testifies that he and the defendant and a third conspirator, Brown, agreed to murder the deceased. That testimony establishes the foundation for admission of Brown's out-of-court statements. Allen then testifies that he himself was elsewhere at the time of the murder but that on the following day Brown (a) reported to him that the objective of the conspiracy was mainly accomplished because he had witnessed the defendant commit the murder and (b) asked for advice on disposing of the murder weapon in order to accomplish the conspiracy's final goal of leaving no evidence. The latter inquiry brings the entire statement within the furtherance of the conspiracy. That is the sum of the government's case.

There can be no doubt in this example that Brown, a purported eyewitness to the murder, and the defendant's accuser, is a "witness against" the defendant within the meaning of the Confrontation Clause, and we would have thought that the core values protected by the Clause would entitle the defendant "to be confronted with" Brown, not simply with Allen's testimony that Brown, murder weapon in hand, said that the crime was the defendant's. And it seems to us inconceivable that the government should be able to defeat the guarantee of the Sixth Amendment in such a case on the ground that making a good faith effort to produce the out-of-court declarant is burdensome. If burdensomeness is to be the test under the Confrontation Clause, then the government could dispense as well with producing the coroner and Allen, substituting in their place affidavits and depositions.

II. THIS COURT SHOULD NOT ORDER A REMAND FOR A HEARING ON THE QUESTION OF THE WITNESS' UNAVAILABILITY

The government urges the proposition that, even if this Court agrees that a good faith effort to produce a co-conspirator is a necessary predicate to the use of his out-of-court declarations, the court of appeals "erred in ordering a new trial without giving the government an opportunity on remand to prove unavailability." (Govt. Br. 44.) On this record, it is clear that there are two reasons for determining that the court of appeals did not err: the government *had and declined* its opportunity in the trial court to prove unavailability or produce the declarant; and a hearing more than two years after the trial would be useless for determination of availability *vel non* at trial.[16]

The government asks here for a second bite at an apple it once rejected. The government was advised at trial that it should produce the witness. The trial judge specifically told the government's attorney that he would hear from the witness once the government put him on the

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[16] An additional reason for declining to grant the government's request for a remand is the fact that the question of remand was not ruled on by the court of appeals. The government never raised the issue until its Petition for Rehearing and Suggestion for Rehearing In Banc. "Ordinarily, this Court does not decide questions not raised or resolved in the lower court." *Youakim* v. *Miller*, 425 U.S. 231, 233-34 (1976). *See also United States* v. *Lovasco*, 431 U.S. 783, 788-89 (1977); *Usery* v. *Turner Elkhorn Mining Company*, 428 U.S. 1, 37-38 (1976); *Singleton* v. *Wulff*, 428 U.S. 106, 120 (1976). The remedy now sought by the United States is neither simple nor expeditious. Because the issue was not properly raised, the scope and purpose of such a hearing are ill-defined and raise factual issues not addressed by the parties.

stand out of the presence of the jury. (4 Trs. 408.) The judge admonished the government that it should establish unavailability at trial, rather than risk litigating on appeal its failure to do so. (3 Trs. 292.) The government chose to ignore that admonition, and rested its case after representing only that the witness "apparently" had "car trouble." (4 Trs. 408.)

A hearing now would be completely inadequate as a device for resolving the question whether the witness would have testified had the government accepted the trial court's offer to hear from him first out of the jury's presence. There is no allegation that the witness was physically unavailable, a matter which might be susceptible of determination two years after the trial. It is clear that the government was in touch with the witness, since it made repeated representations that he would testify against respondent.[17] Rather, the issue which the government proposes to resolve on remand (in addition to the

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[17] The court below commented on the government's failure to try to secure the witness's presence:

> "Government counsel did not request a bench warrant, nor does it appear that they made any additional effort to compel his attendance at trial. We can safely assume that counsel's conduct would have been considerably more aggressive had counsel felt it was necessary in order to 'win'. Under such circumstances, counsel would have sought a bench warrant and refused to assume that the judicial process is so impotent that a witness's hostility is a basis for making no effort. Counsel's efforts here clearly do not constitute a 'good faith effort' under *Barber*." (Pet. App. 15a.)

witness' "car trouble"), is whether Lazaro would have refused to answer questions on pain of contempt.[18]

Whether or not Lazaro would have gone to contempt at time of trial, or whether or not he will choose to go to contempt at a new trial, cannot be answered outside the context of a trial. As the court below noted, any such determination of the witness likely response to a threat of contempt would be based on speculation: "Every veteran trial judge has experienced the situation where a hostile witness discards his 'stonewalling' tactics when faced with an imminent contempt citation" (Pet. App. 15a).

Even the government does not contend that this record supports a conclusion that the utility of cross-examination of Lazaro, if he had testified, is remote. In this case, where several conversations were partly in code, where it was one of Lazaro's conversations which the jury asked to hear again before returning its verdict against respondent, and where the government does not contest the utility of confrontation, there is no likelihood that the district court would find beyond a reasonable doubt that cross-examination of Lazaro would not have been useful at trial. The

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[18] The Fifth Amendment claim was never made at trial. Indeed, the government suggested there that the witness had no such privilege. (4 Trs. 408.) It was raised for the first time by way of speculation in the government's brief to the court of appeals. Thus, it is not properly before the court now. Even were it properly raised, the court of appeals was correct when it noted that it "would not find an adequate showing of unavailability absent an actual assertion of privilege and exemption by ruling of the court. Unlike defendants, witnesses have no blanket right to stand mute; we cannot say on the basis of this record that John Lazaro would have asserted the fifth amendment privilege." (Pet. App. 16a.)

likely effect of his testimony on cross-examination could not, at a remand hearing, be determined to be so pallid that denial of confrontation could be ruled harmless error.

In this instance the hearing requested by the government would be meaningless. The Court should not order a remand.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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No. 84-1580

In the Supreme Court of the United States

OCTOBER TERM, 1985

UNITED STATES OF AMERICA, PETITIONER

v.

JOSEPH INADI

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Constitution and rules:

U.S. Const.:

Fed. R. Evid.:

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REPLY BRIEF FOR THE UNITED STATES

I.

Respondent has not answered any of the principal points made in our opening brief. Respondent has not disputed any of the historical facts that, in our judgment, lead to the conclusion that the Confrontation Clause was not intended as a general regulation of the admission of hearsay. Respondent has interpreted this Court's Confrontation Clause cases in a way that would revolutionize the law of evidence and that we do not believe this Court could have intended. And, perhaps most important, respondent has failed to explain what practical benefit defendants would derive from the rule adopted by the court of appeals. In particular, respondent's brief does not contain even a hint of an answer to the common sense question that jumps out from this case: If respondent really wanted to question the co-conspirator/declarant John

Lazaro, whose whereabouts were known to the defense, why didn't respondent subpoena him? Respondent's brief is written as if trial subpoenas were unknown and the Compulsory Process Clause did not exist.

A. The Historical Evidence

In our opening brief (at 12-24), we reviewed the history of the confrontation right, the hearsay rule, and the framing and adoption of the Sixth Amendment, and we made the following points:

> 1. The right to confrontation grew up to prevent the practice of trial by affidavit or deposition. There is no evidence that this right was intended generally to regulate the admission of hearsay.
>
> 2. Many exceptions to the hearsay rule were recognized before the adoption of the Sixth Amendment, and the co-conspirator rule developed at approximately the same time as the adoption of the Bill of Rights.
>
> 3. There is no evidence that the framers of the Sixth Amendment intended to alter or extend the right to confrontation as it was then commonly understood; in particular, there is no evidence that the framers intended the Confrontation Clause to abrogate hearsay exceptions or generally to regulate hearsay.
>
> 4. For nearly 200 years, it has been accepted that certain out-of-court statements, including co-conspirator statements, are admissible—if they satisfy various other, carefully drawn conditions—whether or not the declarant is available to testify.

Respondent's brief contains no historical evidence refuting any of these points. This is obviously revealing because we believe that these points strongly suggest the conclusion that the Sixth Amendment was not intended either to bar the admission of all hearsay or to serve as a general standard for the regulation of hearsay. Had the framers of the Sixth Amendment intended to alter the confrontation right so as to achieve such results, there would surely have been some discussion or debate. Moreover, if the framers had harbored such an intention, it seems most unlikely that this would have completely escaped the notice of or been ignored by the judges and practitioners of the era and have come to light only in the last few years. See *United States* v. *Ross*, 456 U.S. 798, 819 (1982) ("The fact that no such argument was even made illuminates the profession's understanding of the scope of the [right in question].").

Although respondent discusses (Br. 9-14) the historical materials, it is difficult to tell what he makes of them. He points (Br. 9-10) to the fact that Hale and Blackstone did not expressly reject application of the right to confrontation to regulation of the admission of hearsay. However, the most plausible conclusion to be drawn from this omission is not that these authorities endorsed the proposition that the confrontation right generally regulates hearsay or even that they entertained doubts on the subject. Rather, the most plausible conclusion—indeed, we would say the only plausible conclusion—is that such an interpretation of the confrontation right did not even occur to them. After all, both the confrontation right and the admission of hearsay pursuant to exceptions to the hearsay rule were well recognized at the time, and it was the practice then, as it has been ever since, to admit certain types of hearsay without inquiring whether they met special requirements stemming from the confrontation right.

Respondent suggests (Br. 11) that it is impossible to determine what the framers of the Sixth Amendment meant by the right to confrontation. For reasons already touched upon, however, this argument does not support the decision below. It is true, as we noted in our opening brief (at 17-18), that the Confrontation Clause produced little discussion or debate in Congress and in the state legislatures during ratification. As a result, it is probably not possible to discern the intent of the framers on some fine points of Confrontation Clause jurisprudence. But with respect to the broad question implicated in the present case—whether the Confrontation Clause was meant as a general standard for regulating hearsay—the silence of the framers can indicate only one answer, for it simply is not credible that the framers dramatically changed the settled meaning of the confrontation right without leaving any hint in the historical record. Thus, even were respondent correct that we have shown nothing more than that the dog did not bark, one need hardly be a Sherlock Holmes to find meaning in that silence. [1]

[1] Respondent also contends (Br. 11) that our opening brief gave "short shrift" to "the historical function of the right of confrontation," which respondent seems to identify as providing an opportunity for cross-examination and assessment of the witness's demeanor. There can, of course, be no doubt that these are the broad purposes underlying the right of confrontation, but it is an enormous leap from these broad purposes to the rule adopted by the court of appeals in the present case. The opportunity for cross-examination and assessment of demeanor are restricted whenever a court admits a hearsay statement made by a non-testifying declarant. It must follow, therefore, either (a) that all hearsay is barred by the Confrontation Clause (a conclusion at war with the last several centuries of Anglo-American evidence law and practice) or (b) that there are valid exceptions to the general principle that persons whose statements are introduced as evidence in criminal cases should be available for cross-examination and assessment of demeanor. Since there must be such exceptions, respondent's argument is not at all advanced by the recitation of the broad purposes served by the confrontation right.

B. The *Roberts* Dictum

In our opening brief, we argued that this Court's Confrontation Clause cases disclose a three-part approach to the admission of hearsay. First, the Court has closely regulated the admission of those types of hearsay—chiefly former testimony—that are analogous to affidavits and depositions, the forms of proof that the confrontation right was historically intended to restrict. Second, the Court has treated evidence falling within settled and tested exceptions to the hearsay rule as presumptively valid. Third, as is illustrated by *Dutton* v. *Evans*, 400 U.S. 74 (1970), which involved a state variation of the traditional co-conspirator rule, the Court has held out the possibility of more exacting scrutiny of novel departures from traditional hearsay principles.

Disagreeing with this analysis, respondent instead reads *Ohio* v. *Roberts*, 448 U.S. 56 (1980), and other cases involving the admission of former testimony as articulating Confrontation Clause principles that apply to all hearsay exceptions and not just the exception for former testimony (see Resp. Br. 18-28). Respondent expresses amazement (Br. 26-27) at our argument that this Court's cases dealing with the admission of former testimony are—of all things—about the admission of former testimony. Clearly respondent's position is contrary to basic principles regarding the interpretation of judicial opinions. Presumably respondent would agree that the *holdings* of the former testimony cases appl only to the admission of former testimony. Thus, respondent's position must be that dictum in these cases was intended to

settle the application of the Confrontation Clause, not just to the single exception for former testimony, but to the more than 30 commonly recognized exemptions from and exceptions to the hearsay rule (see Fed. R. Evid. 801, 803, 804). However, it seems to us completely implausible to suggest that this Court announced Confrontation Clause principles of such general applicability and importance based upon an examination of a single hearsay exception, which, not coincidentally, happens to be the one that most precisely conforms to the purpose of the Confrontation Clause.

In the end, the analysis espoused by respondent and the court of appeals rests almost entirely upon the dictum from *Ohio* v. *Roberts*, 448 U.S. at 65, that "[i]n the usual case * * *, the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant." Respondent reads this dictum as the final word on the meaning of the Confrontation Clause with regard to the availability of hearsay declarants. Respondent states (Br. 20): "[b]y its terms, the *Roberts* rule of unavailability applies to all out-of-court declarations, whether or not they fall within traditional hearsay exceptions." Respondent reiterates (Br. 28): "[The *Roberts*] rule of necessity applies to all out-of-court declarations." The invalidity of this reading of *Roberts* is illustrated by the conclusion to which it leads, namely, that the 23 specific hearsay exceptions in Fed. R. Evid. 803, none of which requires proof of the declarant's unavailability, cannot constitutionally be used by the prosecution in a criminal case. As we noted in our opening brief (at 26-27), we do not believe that the *Roberts* court could have intended to embrace such a revolutionary proposition in dictum, without briefing or argument

directed to this broad question, and without careful elaboration in its opinion.

Moreover, reading a requirement of unavailability into the Rule 803 exceptions would be nonsensical. Those exceptions generally apply to types of out-of-court statements that, like co-conspirator declarations, have probative value quite independent of any testimony that the declarant might later give in court. For example, an excited utterance—"He hit the pedestrian without even braking!"—obviously has probative significance quite different from any subsequent testimony given by the declarant at a time when the potential consequences of such a statement may influence, or may be thought to influence, his story. To take another, exceptionally important example, live testimony is patently no substitute for regularly kept business records (Fed. R. Evid. 803 (6)).

Although respondent acknowledges (Br. 20) that "[b]y its terms, the *Roberts* rule of unavailability applies to all out-of-court declarations," respondent understandably draws back from the plain implication of this proposition, *i.e.*, that Rule 803 is unconstitutional in substantial part. Respondent suggests (see Br. 20 n.7, 32-35) that proof of unavailability may not be necessary for some or all of the Rule 803 exceptions because hearsay falling within those exceptions has been judged to be particularly reliable. By contrast, respondent maintains (see Br. 14-18), the co-conspirator rule is not based on a judgment about reliability but on principles of agency. In our view, respondent has substantially oversimplified the basis for the co-conspirator rule,[2] but in any event it

[2] Respondent's explanation (Br. 14-18) of the basis for the co-conspirator rule is a misleading oversimplification. In our

view, the co-conspirator rule is supported by three rationales. Although each rationale does not apply to every statement falling within the co-conspirator rule, these three rationales, when taken together, fully support the rule.

First, many co-conspirator statements bear special hallmarks of reliability. As the Seventh Circuit recently explained (*United States* v. *Molt*, 772 F.2d 366, 368-369 (1985)):

> The declarations of conspirators are * * * contemporaneous statements in an ongoing business relation. * * *
>
> [These] declarations are reliable in the same sense that contracts or negotiations among legitimate business partners usually portray accurrately the affairs of those involved. * * *

Second, a high percentage of co-conspirator statements are relevant for non-hearsay purposes. To that extent at least, they are plainly not subject to Confrontation Clause regulation. See *Tennessee* v. *Street*, No. 83-2143 (May 13, 1985). Indeed, many contain no assertions of fact and thus cannot be hearsay. See Fed. R. Evid. 801(c). Other co-conspirator statements, although containing assertions of fact, could be admitted for non-hearsay purposes. Thus, if there were no co-conspirator rule, courts would have to examine very carefully each sentence of a conspiratorial conversation, would have to decide many difficult questions under Fed. R. Evid. 403, and would have to give many potentially confusing limiting instructions.

Finally, there are circumstances in which principles of agency support the admission of co-conspirator statements, *i.e.*, circumstances in which the statement of one conspirator may realistically be viewed as an admission of a co-conspirator. A party's admission is exempted from the hearsay rule because the party can always dispute the accuracy of his own alleged statements. See Fed. R. Evid. 801 advisory note. Likewise, when a co-conspirator/declarant remains in league with the defendant at the time of trial, it makes sense to regard the declarant's statement as the defendant's admission because it often lies within the defendant's power to put on testimony by the declarant disavowing or explaining his alleged prior statements.

is difficult to see how respondent's distinction can be squared with the literal reading of the *Roberts* dictum upon which respondent's entire argument—and the decision of the court of appeals—depends. The *Roberts* dictum states (448 U.S. at 65 (emphasis added)) that "[t]he Confrontation Clause operates in *two separate ways* to restrict the range of admissible hearsay." After making the previously discussed comment about unavailability, the Court observed (*ibid.* (emphasis added)): "The second aspect [*i.e.*, reliability] *operates once a witness is shown to be unavailable.*" Clearly, it is a radical departure from this language to collapse these two requirements into one, as respondent suggests might be done to salvage Rule 803. Thus, unless the *Roberts* dictum is read, as we believe it should be, to refer primarily to the hearsay exception at issue in that case and in the precedents on which the *Roberts* court relied (*i.e.*, the exception for former testimony), that dictum must lead to results that the Court cannot possibly have intended.

In addition, respondent's explanation for the co-conspirator exception—that it is based solely on principles of agency—actually undermines the result reached by the court of appeals. While the co-conspirator may or may not remain allied with the defendant, as his former principal the defendant is in a poor position to insist that the prosecution produce the declarant rather than the defense.

In substantial part, respondent's brief appears to be an attack upon the co-conspirator rule on the ground that it allows the admission of unreliable hearsay. However, the question in this case is not whether it would be advisable to reformulate the fed-

eral co-conspirator rule. We disagree with respondent's assessment of the rule, but in any event his argument would be more appropriately directed to Congress or the Advisory Committee on the Rules of Evidence.

C. Costs and Benefits of a Requirement That Unavailability be Shown

In our opening brief, we explained that the rule adopted by the court of appeals would produce very little legitimate benefit for criminal defendants, while imposing a substantial burden on the prosecution and the entire judicial system. These arguments are largely unanswered in respondent's brief.

1. *Benefit to defendants.* The court of appeals held that a co-conspirator statement may be introduced if the government a) "produces[s] the declarant[] for cross-examination" (Pet. App. 12a) or b) shows that the declarant is unavailable. Thus, as we observed in our opening brief (at 41), the court of appeals' rule cannot be justified on the ground that it keeps out an inferior type of evidence, because under that rule co-conspirator statements will always be admitted provided that the prosecution jumps through the prescribed hoops—*i.e.*, either produces the declarant or shows to the court's satisfaction that the declarant is unavailable. Consequently, if the court of appeals' rule would benefit defendants at all, it must be because of the additional evidence that it may bring in. On examination, however, it seems quite clear that the court of appeals' rule will bring in little if any additional testimony favorable to the defense. The effect of the court of appeals' rule in this regard is illustrated by the following chart:

EFFECT OF COURT OF APPEALS' RULE ON AVAILABILITY OF ADDITIONAL TESTIMONY

No additional testimony with respect to the following co-conspirator/declarants:	Additional testimony with respect to following co-conspirator/declarants:
Those who would be called anyway by prosecution or defense.	Those, if any, who a) can be found *and* b) will not refuse to testify *and* c) would not be subpoenaed by either side (as regular or hostile witness) *but* d) would be questioned by defense if produced by government
Those who would refuse to testify if called.	
Those who cannot be found.	
Those whom defense would not want to question even if produced by prosecution.	

It is evident that exceedingly few declarants will fall into the category represented by the right column of the chart and therefore that the court of appeals' rule will produce little if any additional testimony of potential value to the defense. If the defense does not wish to call a witness to testify either as a regular or hostile witness, it is difficult to understand why the defense would want to question the witness if produced by the government in accordance with the court of appeals' new rule. In the present case, for example, if respondent really wanted to question the co-conspirator/declarant Lazaro, it is difficult to understand why the defense did not subpoena Lazaro or make any other efforts to secure his testimony. Certainly it cannot be, as respondent repeatedly asserts, so that the right of cross-examination is preserved, for Fed. R. Evid. 806 expressly provides that "[i]f the party against whom a hearsay statement has been admitted calls the declarant as a witness,

the party is entitled to examine him on the statement as if under cross-examination."

Although we posed these questions in our opening brief, respondent has not provided a plausible answer. Respondent's only explanation (Br. 38) is the following:

> In the case here the defendant cross-examined both McKeon and Mrs. Lazaro [co-conspirator/declarants who testified for the government] at length and was prepared to cross-examine Mr. Lazaro had the government called him * * *.

This answer is clearly not responsive to our argument. If John Lazaro had testified for the government and given testimony damaging to the defense, one would expect defense counsel to cross-examine him in an effort to negate or limit the damage. The question that is posed by our analysis is not whether respondent would have cross-examined John Lazaro if he had testified for the prosecution but ~~whether~~ the defense had any independent desire to secure Lazaro's testimony, employ the procedures available to it for that purpose.

2. *Burden on the government and the judicial process.* In our opening brief (at 40-41), we noted that the court of appeals left unclear whether its new rule requires only that the prosecution bring the co-conspirator/declarant to the courthouse or whether the prosecution must actually place him on the stand as its witness. If the court of appeals was concerned solely with the production of the declarant, we do not understand why this question should not be addressed under the Compulsory Process Clause rather than the Confrontation Clause. On the other hand, if the court of appeals' rule requires the prosecution

to conduct some kind of direct examination of the declarant, this procedure would disrupt the adversary process and create a severe potential for jury confusion. Respondent's brief does nothing to clarify this important issue.

Even if production of the declarant is all that is required, the court of appeals' rule, as we explained in our opening brief (at 37-40), would impose substantial burdens on the prosecution and the judicial system as a whole. First, there is the burden and disruption of having to transport large numbers of co-conspirator/declarants to the courthouse. Often these individuals will be incarcerated in institutions remote from the scene of trial, and therefore transporting them to court will be burdensome for prison officials and the marshals, as well as occasioning an increased risk of escape. Respondent's only answer to this point (see Br. 37 n.15) is that the legal mechanisms for producing an incarcerated witness "have long been readily available." Our point, however, had nothing to do with the availability of a legal mechanism for producing an incarcerated inidvidual but the practical burden of having to do so when neither party affirmatively desires testimony from the individual.

Where the declarant is not incarcerated, the burden and disruption caused by the court of appeals' production requirement may be just as great or greater. Such declarants will often have a strong desire not to testify because of sympathy for or fear of the defendant. Accordingly, it is entirely predictable that many such declarants will make it as hard as they can for the government to discharge the production burden imposed by the court of appeals. The seemingly evasive behavior of John Lazaro in this case is a foretaste, we think, of what will frequently

occur if the decision below is affirmed. If a witness is not incarcerated and does not wish to appear in court, the government has no ability to compel his attendance until he has disobeyed at least one subpoena and a bench warrant has been issued. By that point, of course, the court proceedings will have already been disrupted at least once.[3]

The second burden caused by the court of appeals' rule is that of demonstrating on the record that a declarant is not available to testify. This may involve two different problems. In some cases—for example, those in which the government wishes to introduce statements contained in tape recordings of electronic surveillance—it may be very burdensome for the government to establish on the record that it has exhausted all reasonable means of identifying unknown participants in a conspiratorial conversation. Consider for example a case in which members of a drug distribution conspiracy discuss plans for distributing drugs, and one of the participants

[3] Respondent seeks to minimize the burden of the court of appeals' rule by observing (Br. 37) that "in some circumstances" the government would not have to bring a declarant to court but "could show its good faith efforts to produce through the simple procedure of presenting an affidavit from the declarant establishing that he would claim the privilege." But respondent ignores the obvious fact that many co-conspirator declarants will not obligingly execute such affidavits. Those who are incarcerated may view a trip to court as a welcome escape from the daily routine; others may refuse to execute an affidavit out of simple hostility for the prosecution or because they want to assist the defense by making the prosecution's task as difficult as possible. While this procedure is convenient for respondent to espouse here, we doubt that future defendants will so meekly acquiesce; nor is it clear that the affidavit procedure could be forced upon them. See U.S. Br. 40 n.36.

in the conversation is an unknown conspirator whom the other conspirators address by nickname or by his first name—let us say "Pete." The potential scope of an investigation to ascertain the identity of "Pete" is obviously vast. How many persons associated with the known conspirators must be questioned? How many persons must be asked to listen to the tape? If the known conspirators are found to have numerous friends and associates by the name of "Pete" or "Peter," must they all be tracked down? If the tape contains internal leads regarding "Pete's" identity—if for example it seems to reveal his occupation or city of residence—how far must those leads be pursued? Problems similar to these have already arisen. In *United States* v. *Ordonez*, 737 F.2d 793, 802 (9th Cir. 1984), the court held that the Confrontation Clause was violated because the government introduced drug ledgers containing entries made by unidentified co-conspirators without demonstrating to the court's satisfaction that it was totally unable to identify these conspirators. The court did not explain, however, precisely what steps it believed the government was obligated to take to discharge this burden.

Some co-conspirator declarants, while identifiable, may not be locatable, and thus the government would be compelled under the decision below to demonstrate to the satisfaction of the trial court—and ultimately the appellate courts—that all reasonable efforts had been made to locate and assure the availability of the declarant. Respondent cites *Ohio* v. *Roberts* (Br. 36 n. 14) to show that this obligation is not "unduly burdensome," but to us that case well illustrates the great burdens this rule will in fact impose on the courts. In *Roberts*, the state ultimately succeeded (over three dissents in this Court) in establishing

that the witness in question could not reasonably be found—but not before the state had litigated the issue at three levels in the state courts, as well as before this Court.

Furthermore, even if it can be established that a declarant cannot be found at the time of trial, a contention may be made that the declarant slipped away because the government did not take sufficient steps to monitor his whereabouts. See *Motes* v. *United States*, 178 U.S. 458 (1900). Requiring the government to show everything it did to keep tabs on the declarant during the weeks or months before trial would be a considerable burden. And what steps the courts would regard as sufficient is of course as yet unknown.

II.

In our opening brief (at 44-46), we contended that even if a showing of unavailability were required, the court of appeals erred in ordering a new trial instead of first remanding for a hearing on John Lazaro's availability. If Lazaro was unavailable, we argued, respondent was not prejudiced and a new trial should not be ordered.

Respondent defends the court of appeals' disposition on two principal grounds. First, he argues (Br. 40 (emphasis in original)) that "the government *had and declined* its opportunity in the trial court to prove unavailability or produce the declarant" and that the government should not get "a second bite at an apple it once rejected."[4] This argument would

[4] While the court of appeals ultimately came to a different conclusion, it was not necessarily clear to the prosecutor at the time that Lazaro's statement to her that he would refuse to testify—relayed by her to the court—was inadequate to establish his unavailability. See J.A. 18-19.

unreasonably penalize the government. At the time of trial the government had perfectly reasonable grounds for believing that proof of Lazaro's unavailability was not required. Not only had the trial court implicitly so held (see U.S. Br. 5), but nearly 200 years of practice permitted the admission of co-conspirator statements without any showing of unavailability. Moreover, even if the government could be faulted for not satisfactorily demonstrating Lazaro's unavailability, such an error would not explain why the judicial process and society should be penalized by depriving the trier of fact of evidence probative of respondent's guilt. Unless Lazaro would have testified at trial and given material testimony favorable to the defense, the government's alleged error in failing to produce him in court did not prejudice respondent and accordingly should afford no reason to disturb respondent's conviction.

Respondent also contends (Br. 41) that a remand hearing "would be completely inadequate as a device for resolving the question whether [Lazaro] would have testified." Respondent argues that Lazaro had no legal basis for refusing to testify and therefore that the question that would have to be resolved on remand is whether he was willing to stand in contempt. This argument is plainly incorrect. At the time of trial, Lazaro had been convicted of related state charges, but he could have been prosecuted for federal offenses similar to those charged against respondent. Consequently, Lazaro's entitlement to claim the Fifth Amendment privilege seems clear. If this Court adopts the Confrontation Clause rule crafted by the court of appeals, the government should not be deprived on remand of the opportunity to show

beyond a reasonable doubt that production of Lazaro in the courtroom would not have altered the outcome of the trial.[5]

CONCLUSION

For these reasons and those set forth in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

CHARLES FRIED
Solicitor General

NOVEMBER 1985

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[5] Respondent also contends (Br. 40 n.16) that the government waived its right to object to the relief ordered by the court of appeals—a new trial—because the government did not address this issue until after the court's decision was announced. This is surely an extreme application of the rule that arguments ordinarily should not be raised for the first time on rehearing. Until the court of appeals handed down its decision, the government did not know whether the court would find a Confrontation Clause violation, much less that it would order what in our view is entirely inappropriate, wasteful, and excessive relief. We are not aware of a rule requiring appellees to anticipate and brief all forms of unwarranted relief that an appellate court might impose.

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